Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY BEARD, et al.,
Petitioners

v.

JESSE BOND,
Respondent

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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Capital Case

Question Presented

On state collateral review, a capital defendant claimed that trial counsel was ineffective for not presenting more mitigation evidence, in particular from psychologists and psychiatrists. After a seven-day evidentiary hearing, the state courts concluded that trial counsel had properly begun his mitigation investigation months in advance, that the new defense experts had been "thoroughly refuted" at the post-conviction hearing, and that the evidence originally presented was constitutionally adequate. The federal court of appeals disagreed with each of these conclusions, determined that trial counsel should have presented an "upgraded" mitigation case, and held that the state courts therefore acted "unreasonably" under 28 U.S.C. § 2254(d).

On federal habeas corpus review of the state court's resolution of a claim of ineffective assistance of counsel, did the court of appeals apply the "doubly deferential judicial review" standard required by Knowles v. Mirzayance?

List of Parties

Petitioners

Jeffrey Beard

William Stickman

Joseph Mazurkiewicz

The District Attorney of the County of Philadelphia

The Attorney General of the State of Pennsylvania

Respondent

Jesse Bond

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Clark v. Arizona, 548 U.S. 735 (2006) — 16, 17

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Strickland v. Washington, 466 U.S. 668 (1984) — 8, 9, 19, 20

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28 U.S.C. § 2254(d) — 7, 8

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, affirming the district court's grant of a conditional writ of habeas corpus, was entered August 20, 2008, is published at 539 F.3d 256, and is reproduced in the Appendix at App. 5-92.

The opinion of the United States District Court for the Eastern District of Pennsylvania, mandating either a new penalty hearing or a sentence of life imprisonment, was entered April 24, 2006, and is reproduced in the Appendix at App. 93-119.

Statement of Jurisdiction

This Court has jurisdiction to review the judgment of the court of appeals under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provision Involved

The Sixth Amendment to the United States Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Title 28 of the United States Code, section 2254(d), provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application, of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Statement of the Case

Over a two-week period in 1991, Jesse Bond committed three separate robberies. On each occasion, he opened fire in cold blood – badly wounding one victim and killing two others. He received the death penalty for the last murder, and the state courts upheld it on direct and collateral appeal. But on federal habeas attack – despite the "doubly deferential" standard of review that applied there – the court of appeals overturned every significant state court ruling in the case, and vacated the death sentence on the ground that trial counsel was ineffective for not presenting "upgraded" mitigation evidence.

The relevant proceedings began shortly after the defendant's arrest, when an attorney was appointed to represent him in all three cases. The charges were tried separately, and only this case was capital. Before trial in the non-capital homicide, counsel retained a forensic psychologist (who also had a law degree and had practiced as a criminal defense attorney) to perform a mental health evaluation. App. 110, 135, 139.

After reviewing all the case materials, the defense expert conducted a clinical interview with the defendant to identify any psychological or substance abuse issues, and administered a battery of tests. The expert also interviewed the

defendant's mother. As the result of his investigation, the expert concluded that there were no grounds for mitigation evidence based on mental health. He prepared and submitted a written report to that effect. App. 135, 139-40; N.T. 4/15/97, 61-62, 126-31.

Counsel then interviewed several members of the defendant's family to begin preparing a mitigation case based on their testimony. Co-counsel was appointed to assist with the upcoming capital trial. App. 62, 122, 134, 137-38.

Meanwhile, the defendant was convicted of felony murder for the first homicide, in which he killed a woman who worked in the restaurant he had chosen to hold up. This case was tried next, in 1993, and resulted in a conviction for the premeditated, first degree murder of a store owner. App. 93-94.

At the capital sentencing phase, counsel presented seven defense witnesses, including several family members. Their testimony established that, although the defendant's father ran off when the child was six years old, the remaining family members managed to build strong, close relationships. The witnesses portrayed the defendant at the center of these relationships, babysitting for his nieces and nephews, managing his mother's health care, securing job training and employment. App. 57-58.

Until age 25, the defendant had no criminal record. According to the defense, however, his life went into something of a tailspin shortly before the three shootings: his stepfather died, his brother got cancer, he lost his job, he failed his high school equivalency exam. Thus the defense position was that, while the defendant had committed terrible acts and would spend the rest of his life in jail, his crimes were uncharacteristic, and he was ultimately capable of remorse and rehabilitation. App. 58-59, 134.

In the end, however, the jury decided that, after two murders, the balance weighed in favor of death. The sentence was upheld on appeal in 1995, and a new round of review began.

The new defense lawyers had a new sentencing defense. Using many of the same family witnesses who testified at trial, they argued this time that the defendant was in fact the product of a violent, neglectful, poverty-stricken home. Building on a head injury the defendant had suffered, they presented a psychologist who testified that, according to his evaluation, the defendant had organic brain damage. They also presented a psychiatrist who seconded the brain damage claim, and added for good measure that the defendant had post-traumatic stress disorder and suffered from extreme emotional distress. Thus, in contrast to trial counsel, the new lawyers portrayed the defendant as inevitably impaired – a man who

commits crime because he cannot appreciate its criminality. That, they argued, was the kind of mitigation that trial counsel should have presented. App. 60-62, 66-69, 140, 146-49.

The Commonwealth presented its own expert at the post-conviction proceeding, which took place in 1997. He explained that the defense testing had been improperly administered and consistently under-scored, that the defendant's head injury was in fact not that serious, and that there was no organic brain damage. In addition, the defense expert from the original trial proceedings also took the stand. Although presented by the new defense lawyers to support their attack on trial counsel, this expert conceded that, had he been able before trial to review the records that were now being produced by post-conviction counsel, they would not have changed his original opinion that there was no mental status mitigation. App. 140-41, 149-50; N.T. 4/15/97, 183-85.

The post-conviction evidentiary hearing, presided over by the original trial judge, lasted seven days. Afterward, the judge concluded that the defense experts had been "thoroughly refuted," that the defendant was not suffering from organic brain damage, PTSD, or extreme emotional disturbance, that the family members' new testimony was no more effective than their original evidence, and that trial counsel therefore was not ineffective for not presenting the new lawyers'

version of mitigation. App. 149-50. The state supreme court agreed with these conclusions in 2002, on appeal from denial of the post-conviction petition. App. 133-41

The defense then filed a federal habeas corpus petition, at which point everything went the opposite way. In 2006, the federal district court, while denying various new trial claims, decided that the state courts were wrong about the mitigation ineffectiveness claim. The court ordered the penalty reduced to life unless the Commonwealth retried the sentencing hearing. App. 117-18. In 2008 the court of appeals affirmed the district court, greatly expanding on its analysis. App. 55-92. Cross-petitions for reconsideration were denied, and this petition was filed. App. 1-4.

Reasons for Granting the Petition

This case should be summarily reversed, or at the least remanded for reconsideration, in light of *Knowles v. Mirzayance*.

It has been thirteen years since Congress amended the federal habeas corpus statute to require deference for state court rulings that were not unreasonable. 28 U.S.C. § 2254(d). After a series of reversals by this Court, often in summary fashion, it appears that the lower federal courts

have become more careful to state the proper standard for federal habeas review of state criminal judgments.

Statement is not always substance, however. In *substance*, such deferential review has often proven difficult to secure. Indeed, again this Term it has been necessary for this Court to correct a court of appeals in its ostensible application of § 2254(d). *Knowles v. Mirzayance*, No. 07-1315, slip op. at 8 (U.S., decided March 24, 2009) (reversing court of appeals' "finding that the California court had unreasonably applied clearly established federal law").

The difficulty is especially great when the underlying claim is one of counsel ineffectiveness, which carries its own requirement of deference. *See Strickland v. Washington*, 466 U.S. 668 (1984).[1] Thus in *Mirzayance* this Court made clear that habeas review of an ineffectiveness claim must be "doubly deferential." Slip op. at 11.

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[1] "And, because the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied that standard.... The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Mirzayance*, slip op. at 11 (internal quotation and citation omitted).

This case presents yet another indication that some federal courts may be reluctant to accept this limitation on their habeas review powers. The opinion below is full of the *language* of deference. It simply lacks any *actual* deference. "The question is not whether a federal court believes the state court's determination under the *Strickland* standard was incorrect but whether that determination was unreasonable – a substantially higher standard." *Miryazanze*, slip op. at 10-11 (internal quotations omitted).

To be sure, the circuit court here dutifully pronounced the word "unreasonable" each time it overturned a state court ruling. But there was not one point where the federal court even attempted to explain how it made the leap from "incorrect" to the substantially higher threshold of "unreasonable." It is as if the entire opinion had been written in the days before AEDPA, and then updated by using a word processor to find every instance of the word "erroneous" and replace it with the word "unreasonable."

Three key elements of the court of appeals' review process expose its pretense of deference as, in reality, plain old disagreement. They involve a mix of factual and legal conclusions by the state courts, although both types of rulings should have been accorded deference under AEDPA's reasonableness standard. At the very least, the court of appeals should be required to reconsider

this case in light of this Court's latest guidance in *Mirzayance*.

1. The "unreasonable" state ruling that counsel prepared in advance.

The federal court of appeals held that trial counsel performed deficiently in preparing for the penalty phase because counsel and co-counsel supposedly began to do so only the night before. Just as in *Mirzayance*, the court of appeals attributed this supposed lapse to counsel's dejection and discouragement.[2]

And just as in *Mirzayance*, there is a major problem with the court's (psycho)analysis of counsel's conduct: it is flatly contradictory to the conclusion of the court under review. In this case, the Pennsylvania Supreme Court explicitly

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[2] *Mirzayance*, slip op. at 14: "In [the circuit court's] view, 'counsel acted on his subjective feelings of hopelessness without even considering the potential benefit to be gained in persisting with the plea.'"

Opinion below, App. 80: "We do not doubt that the prospect of representing a defendant at a capital penalty phase hearing can overwhelm even experienced lawyers. Nor does it surprise us that a first-degree murder verdict would disappoint defense attorneys who have worked hard during a trial. But that does not excuse trial counsel's failure to prepare for the penalty phase prior to the handing down of the conviction."

considered and rejected the claim that counsel failed to investigate until the last possible minute. Indeed the state court cited to record evidence directly demonstrating that counsel retained a mitigation specialist and solicited mitigation evidence from numerous family members – *two months* before the penalty hearing.[3]

Remarkably, the federal court of appeals did not even acknowledge the existence of the state

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[3] As the state court held, "the record contradicts appellant's assertion that counsel in this case did not begin to investigate mitigation evidence until after the guilty verdict. Appellant cites to places in counsel's testimony where they refer to the efforts made on the eve of the penalty phase in this case without acknowledging the overall circumstances. In fact, lead counsel had also been appointed to represent appellant in his other criminal cases, including a separate homicide, which proceeded to trial in December 1992, approximately two months before the trial in this case. During the previous trial, lead counsel had spoken with family members with respect to information about appellant that might be helpful in mitigation. N.T. 4/15/97 at 32-35, 62-64, 82-83. In addition, counsel had hired Dr. Tepper prior to the previous trial. One of the reasons for referring appellant to Dr. Tepper for evaluation was to discover any evidence that might be helpful as mitigation evidence in the penalty phase. Dr. Tepper's report was completed and forwarded to counsel in early December, two months before this trial. Thus, the record belies appellant's misstatement that his counsel did not begin preparing for the penalty phase until the night before the hearing began." App. 139-40; *see also* App. 134-35, 137-38.

ruling on this issue – not until *after* it had spent over six hundred words condemning counsel's supposedly tardy and therefore incomplete preparation. Even at that point, the circuit court barely mentioned what the state court had held – and then promptly dismissed that holding as "unreasonable." App. 82-83.

But how could the state court have been so completely wrong about whether counsel prepared before trial? The circuit court never answered that question. On the one hand, it baldly asserted that there was no record evidence of advance preparation, App. 83; yet on the other hand it discussed (albeit in an effort to minimize) some of the very evidence relied on by the state court, which showed that counsel had retained an expert and met with witnesses months before this trial. App. 62-63, 69.[4]

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[4] The circuit court also complained that counsel should have elicited different information from these potential mitigation witnesses – *i.e.*, information that would have supported the kind of penalty phase defense the court thought counsel should have presented, rather than the defense that counsel actually presented. *See* issue 3., *infra*.

But the court made clear that its finding of deficient performance was nonetheless premised on its conclusion that counsel did not start any penalty phase preparation until after the guilty verdict. "Trial counsel[] fail[ed] to prepare for the penalty phase prior to the handing down of the

(continued...)

This was a straightforward issue of historical fact. If the state court's reading of the record was so irrational that no reasonable person could have concurred, then surely the federal court should easily have explicated the error. Instead the court treated the state ruling as an afterthought, unworthy of any serious attention. The proper standard of review demands far more.

2. The "unreasonable" state ruling that the new defense experts were "thoroughly refuted."

The court of appeals further held that trial counsel was ineffective for failing to secure the testimony of experts, who supposedly would have established that the defendant suffered from the usual catalogue of psychological ailments alleged in death penalty litigation: "organic brain damage," "post-traumatic stress disorder," and "extreme emotional disturbance" caused by his "dysfunctional" childhood.

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[4](...continued)
conviction. . . . These attorneys . . . should not have waited until the eve of the penalty phase to begin their preparations. . . . Counsel's failure to think ahead caused them to fail to inquire meaningfully. . . . [C]ounsel conducted an *ad hoc* and perfunctory preparation for the penalty phase *the night before it began* [emphasis in original]. . . . [C]ounsel decided at the eleventh hour." App. 80-82.

Once again, the federal court's conclusion runs smack into the state courts, which thoroughly aired these claims in a lengthy evidentiary hearing, and found that they were "thoroughly refuted" by the record developed there. App. 140-41, 148-49.

That finding should have held back the federal court – but it did not. The court of appeals simply declared yet again that the state courts were "unreasonable" in rejecting this expert opinion. This time the federal court said it could cast aside the state courts' ruling because the defense presented two experts at the post-conviction hearing – one to claim organic brain damage, the other to claim PTSD and extreme emotional disturbance – whereas the prosecution presented only one expert, who addressed only the organic brain damage claim. App. 87. At the end of the day, in other words, the defense was ahead in the tally of the psycho-diagnoses.

But that sort of analysis would be off base even in a pre-AEDPA world. Under the doubly deferential standard of review applicable here, it was not even in the ballpark. In reality, *both* defense experts asserted organic brain damage, an allegation that the Commonwealth's neuro-psychologist did indeed thoroughly refute. App. 140-41, 148-49. The additional claims of the second defense expert, however, were hardly left on the field, unaddressed; on the contrary, they were the subject of an additional finding by the state trial

judge, who *specifically rejected them*.[5] Yet the court of appeals never even mentioned this additional finding.

In any event, the process by which the federal court circumvented the state rulings on mental health evidence would be troubling no matter how many witnesses each side had presented, or how much of their testimony went without specific reply. Fact-finding is not a bijective function: there is no requirement of one-to-one correspondence between every statement by opposing witnesses before testimony may be discounted. The trial judge was called upon to make an overall credibility judgment about the persuasiveness of the witnesses presented by the defense, which bore the burden of proof in this proceeding. That judgment arose not only from what the prosecution's witness said, but from what the defense witnesses themselves said, particularly on cross-examination.[6] The federal court was not

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[5] "With respect to Dr. Richard Dudley's testimony that petitioner suffered from post-traumatic stress syndrome when he examined him in 1996, there is no showing that petitioner suffered from this disorder at the time of the offense in 1991. Accordingly, petitioner has failed to carry the burden of showing that, at the time of the offense, he was under the influence of extreme emotional or mental disturbance." App. 150.

[6] Indeed even during the course of the proceedings,

(continued...)

free to second-guess the state court's appraisal of the expert evidence.

The circuit court's rejection of the state court ruling was even more improper given the field of expertise in question. The dispute here, after all, was not about the laws of physics. Forensic psychology, if science it is, is hardly an exact one. This Court has written extensively on the dangers of transplanting mental health treatment concepts into the constructs of criminal responsibility. *Clark*

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[6](...continued)
the trial judge expressed his skepticism over the core defense claims. *See, e.g.*, N.T. 4/15/97, 204 ("There was a psychologist who testified and told us his opinion.... I just am trying to find out if you agree with him because I don't"); N.T. 4/15/97, 217 (suggesting that defense expert employed particular testing procedure because he had a "preconceived" position that the defendant was brain-damaged); N.T. 4/21/97, 131 (noting the defendant's inconsistent accounts of his alleged drug use); N.T 4/21/97, 139 (questioning expert's suggestion that the defendant did not appreciate the criminality of his conduct; "Did he know he was shooting someone when the man said don't shoot me and he pulled the trigger?"); N.T. 4/21/97, 140-42 (challenging notion that difficulties in the defendant's childhood excused his criminal conduct; "So anyone with ... that type of background could commit these crimes and would have [the statutory mitigating circumstance of extreme] emotional disturbance? ... What makes this defendant different from all the other people who have these same type backgrounds?").

v. Arizona, 548 U.S. 735 (2006).[7] In the face of such inherent uncertainty, how could the state courts' view of the mental capacity evidence possibly be dismissed as "unreasonable?" There was no deference here.

3. The "unreasonable" state ruling that counsel's original mitigation evidence was adequate.

The circuit court concluded that, in addition to his failure to present the expert testimony that was discredited by the state courts, counsel was also ineffective for failing to present "upgraded" non-expert testimony, App. 88 – primarily from the same family members who testified at the original sentencing hearing.

As before, this conclusion required the court of appeals to discard an exactly opposite ruling by the state courts. As before, the federal court was careful to invoke "unreasonableness" in doing so.

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[7] "[T]here are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. . . . [T]he expert witness is required to make a leap in logic. He no longer addresses himself to medical concepts but instead must infer or intuit what is in fact unspeakable, namely, the *probable relationship* between medical concepts and legal or moral constructs such as free will." 548 U.S. at 775-77 (internal quotation and citation omitted).

And as before, what was missing was any coherent case for such a pronouncement.

Both the state and federal courts recognized counsel's original mitigation strategy: to emphasize that the defendant had led a law-abiding, admirable life for 25 years, until a series of personal crises temporarily pushed him over the edge. The testimony presented by trial counsel made clear that the defendant had endured a difficult childhood. But the ultimate message was, as the state supreme court observed, that the defendant's brief period of criminal behavior was both "aberrational and of recent vintage." App. 134.[8]

On collateral attack, the defense, having failed before, tried a somewhat altered strategy.

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[8]As summarized by the circuit court, the evidence that trial counsel presented to the jury was that the defendant's father walked out when the boy was six; that the defendant was well-behaved as a child, respected his elders, and stayed out of trouble; that the defendant was beaten by gang members because he refused to join, and was forced to drop out of high school; that the defendant enrolled in the Job Corps and worked steadily; and that the defendant helped care for his siblings' children, his chronically ill mother, and his elderly neighbors. Shortly before his crimes, however, the defendant's stepfather (his only real father figure) died; his brother was diagnosed with cancer; he lost his job; and he was rejected by the military because he failed his G.E.D. exam by one point. App. 57-58.

New counsel elicited from the same witnesses a more negative picture. The goal was to portray the defendant as the victim of irreparable brain damage, grinding poverty, and familial neglect.[9]

Some might argue that the second type of strategy is "better" – as the federal court plainly presumed – although it is hardly obvious as an objective matter why that is so.[10]

In the end, however, it does not matter – *because "better" is not the test.* That is the whole point of *Strickland*, as the *Mirzayance* decision

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[9] This time witnesses testified that the defendant's mother drank and gambled, and that she was violent with her children; that at times the family lacked for food, clothing, and utilities; and that on occasion the defendant had eaten lead paint chips. School records showed that he had been absent on numerous occasions; that a first grade report card noted he "seems sleepy" and "unkempt"; that he had to repeat third grade; and that over his many years of schooling his mother had accounted for various absences on various grounds: *e.g.*, that he did not have a coat, or shoes, or heat at home. App. 60-62.

[10] The circuit court apparently believed that the setbacks suffered by the defendant just before his crime spree were too pedestrian to qualify as persuasive mitigation: they were "the type of disappointments many people face in life." App. 88. But the same is true of the alternative defense preferred by the federal court. Many people have "dysfunctional," even "awful," childhoods. Almost none of them grow up to be double murderers.

reestablishes. There is always some other thing that counsel could have done. There is always, in the capital sentencing context, some new fact about the defendant's life for which counsel could have searched, always some new spin which counsel could have considered. There is "nothing to lose," *see Mirzayance*, slip op. at 6, 9, in trying. But if that is enough to trump both *Strickland* deference and AEDPA deference, then these standards of review are simply ceremonial.

Given substance, the doubly deferential review standard imposes a high threshold indeed. A state court ruling that violates it should be fairly easy to spot, and simple to describe. Here it took the circuit court over 7,800 words to overturn the state courts – yet none of those words explained how the court of appeals could conclude that the state courts' views were *not even within the realm of reasonable*. If that is what deference looks like, how would the analysis have differed if there were none?

Further review is warranted. The case should be summarily reversed or, in the alternative, remanded for reconsideration in light of *Mirzayance*.

Conclusion

For these reasons, petitioners respectfully request that this Court grant the writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 06-9002 & 06-9003

JESSE BOND
Appellant (No. 06-9002)

v.

JEFFREY BEARD; WILLIAM STICKMAN; JOSEPH MAZURKIEWICZ; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA
Appellant (No. 06-9003)

(D.C. Civil Action No. 02-cv-08592)

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and ALDISERT*, *Circuit Judges*

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*Senior Judge Aldisert is limited to panel rehearing only.

SUR PETITION FOR *EN BANC* REHEARING

The petition for rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

Dated: November 5, 2009

nmb/cc: Michael Wiseman, Esq.
Thomas W. Dolgenos, Esq.
Helen T. Kane, Esq.

App. 3

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 06-9002 & 06-9003

JESSE BOND
Appellant (No. 06-9002)

v.

JEFFREY BEARD; WILLIAM STICKMAN; JOSEPH MAZURKIEWICZ; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA
Appellant (No. 06-9003)

(D.C. Civil Action No. 02-cv-08592)

Present: SCIRICA, *Chief Judge*, SLOVITER, McKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, and ALDISERT,* *Circuit Judges*

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*Senior Circuit Judge Aldisert's vote is limited to panel rehearing only.

SUR PETITION FOR REHEARING *EN BANC*

The petition for rehearing filed by Appellees/cross-appellants having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is DENIED.

By the Court,

/s/ Thomas L. Ambro
Circuit Judge

Dated: September 16, 2008

nmb/cc: Michael Wiseman, Esq.
Thomas W. Dolgenos, Esq.
Helen T. Kane, Esq.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 06-9002 & 06-9003

JESSE BOND

Appellant (No. 06-9002)

v.

JEFFREY BEARD; WILLIAM STICKMAN; JOSEPH MAZURKIEWICZ; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

Appellant (No. 06-9003)

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 02-cv-08592)
District Judge: Honorable John P. Fullam

Argued April 8, 2008

Before: AMBRO, SMITH and ALDISERT,
Circuit Judges

(Opinion filed August 20, 2008;
Amended October 17, 2008)

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OPINION OF THE COURT

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AMBRO, *Circuit Judge*:

Jai Ho Lee died in October 1991 after being shot during the robbery of the Stop and Go Deli in Philadelphia that he managed. A Philadelphia County jury convicted Jesse Bond of Lee's first-degree murder in February 1993. It returned a verdict of death and the court imposed that sentence.

Bond exhausted his state court remedies before filing a petition for *habeas corpus* in the United States District Court for the Eastern District of Pennsylvania. The District Court rejected Bond's challenges to his conviction. It granted the petition as to his death sentence, however, as it concluded that Bond had received ineffective assistance of counsel at the penalty hearing. Bond and the Commonwealth cross-appealed. We affirm the judgment of the District Court in all respects.

I. Background and Procedural History

The Commonwealth prosecuted Bond for shooting Lee when he refused to open the cash register. It prosecuted Aaron Wheeler at the same

trial for serving as Bond's lookout.[1] The Commonwealth presented extensive evidence of Bond's guilt. Yang-Jin Kim, an employee at the Stop and Go Deli who witnessed the entire robbery and shooting from close range, identified Bond as the shooter. The prosecution presented confessions by both defendants that had been redacted to eliminate references to the other defendant by name (although Bond challenged his confession on the basis that it had been coerced and testified that he was not involved in the robbery). Beulah Sheppard also told police that she saw Bond shoot Lee, though she claimed at trial she had lied to the police.

The jury found Bond guilty of first-degree murder, robbery, criminal conspiracy, and possession of an instrument of crime. The penalty phase began the next day. The Commonwealth presented evidence in support of the aggravating circumstance that Bond murdered Lee while committing another felony. It also presented evidence of Bond's criminal history, and specifically his conviction for the robbery and murder of a restaurant

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[1]The jury found Wheeler guilty of second-degree murder, robbery, criminal conspiracy, and possession of an instrument of crime. He was sentenced to a mandatory term of life imprisonment.

owner ten days prior to the murder of Lee.[2] Bond attempted to establish mitigating factors by presenting evidence of his good character and his youth. The jury found three aggravating circumstances and no mitigating circumstances.[3] It returned a verdict of death.

The trial judge denied post-verdict motions and Bond appealed to the Pennsylvania Supreme Court, which affirmed. *See Commonwealth v. Bond*, 652 A.2d 308 (Pa. 1995). Bond filed a petition pursuant to Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Con. Stat. § 9541 *et seq.*[4] The trial judge (now sitting as the PCRA court) held a seven-day hearing on Bond's PCRA claims before denying them all. The Pennsylvania Supreme Court affirmed. *See Commonwealth v. Bond*, 819 A.2d 33 (Pa. 2002).

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[2]Bond avoided the introduction of testimony regarding a third robbery and (non-fatal) shooting because of the timing of the respective trials.

[3]The three aggravating factors were committing a murder in the course of committing a felony, *see* 42 Pa. Cons. Stat. § 9711(d)(6), a significant history of felony convictions involving the use or threat of violence to the person, *see id.* § 9711(d)(9), and a prior conviction for murder, *see id.* § 9711(d)(11).

[4]New counsel replaced trial counsel at this stage in the proceedings.

Bond subsequently filed a petition for *habeas corpus* in the District Court. The Court held an evidentiary hearing regarding Bond's claims, including those of jury discrimination and ineffective assistance of counsel at the penalty phase. It denied each of Bond's guilt-phase claims but vacated the death sentence after granting Bond's petition as to the penalty phase ineffective assistance of counsel claim.

The Commonwealth appeals the grant of penalty phase *habeas* relief. Bond appeals the District Court's denial of his guilt phase claims.[5]

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 28 U.S.C. §§ 2241, 2254. We have jurisdiction over this appeal under 28 U.S.C. §§ 1291, 2253.

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[5]The District Court issued a certificate of appealability as to each of the guilt-phase claims.

We previously denied Bond's request for certificates of appealability regarding the two other sets of crimes he committed shortly before Lee's murder. *See* Order Denying Request for Certificate of Appealability, *Bond v. Blaine*, Case No. 06-2886 (3d Cir. Dec. 20, 2006) (relating to the robbery and non-capital murder of a restaurant owner); Order Denying Request for Certificate of Appealability, *Bond v. Stickman*, Case No. 06-2656 (3d Cir. Dec. 20, 2006) (relating to the robbery and assault of a restaurant owner).

The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") limits *habeas* relief on issues that state courts have decided on the merits. AEDPA bars *habeas* relief unless the state court decision is contrary to or an unreasonable application of clearly established Supreme Court law, or the state court decision involves an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1)-(2); *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). We may not "grant *habeas corpus* relief simply because we disagree with the state court's decision or because we would have reached a different result if left to our own devices." *Werts v. Vaughn*, 228 F.3d 178, 197 (3d Cir. 2000). The state court's application of Supreme Court precedent must have been objectively unreasonable; "[t]he federal *habeas* court should not grant the petition unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent." *Hackett v. Price*, 381 F.3d 281, 287 (3d Cir. 2004) (internal quotation marks omitted).[6] A state court's factual findings are "presumed to be correct," and the *habeas* petitioner carries the "burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C.

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[6]This language comes initially from *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877 (3d Cir. 1999) (en banc). We note that any disagreement on this point among the majority and concurring opinions in *Matteo* is not dispositive here.

§ 2254(e)(1). *See also Chadwick v. Janecka*, 312 F.3d 597, 607 (3d Cir. 2002). We review *de novo* issues that the state court did not decide on the merits. *Everett v. Beard*, 290 F.3d 500, 508 (3d Cir. 2002).

III. Discussion

A. Bond's Appeal of the Denial of his Petition to Vacate his Conviction

Bond argues that the District Court erred in denying three of his guilt-phase claims. We conclude that each argument fails.

1. *Batson* Claim

Bond, who is black, contends that the prosecutor used peremptory strikes in a racially discriminatory manner during jury selection. He argues that this violates the Equal Protection Clause as interpreted in *Batson v. Kentucky*, 476 U.S. 79 (1986). The trial court rejected each of the three *Batson* challenges made by defense counsel, resulting in the seating of a jury consisting of eight white and four black members.[7] The state courts rejected

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[7]The Commonwealth speculates that the deliberating jury may have included 5 black members because one alternate was called into service. The record is inconclusive as to

(continued...)

Bond's *Batson* claim on direct appeal and in post-conviction proceedings. The District Court deferred to the state courts under the AEDPA standard. We affirm.

a. The *Batson* Standard

Batson requires a three-step analysis, which the Supreme Court has articulated as follows:

> First, the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a peremptory challenge on the basis of race. Second, if the showing is made, the burden shifts to the prosecutor to present a race-neutral explanation for striking the juror in question. Although the prosecutor must present a comprehensible reason, "[t]he second step of this process does not demand an explanation that is persuasive or even plausible"; so long as the reason is not inherently discriminatory, it suffices. Third, the court must then determine whether the defendant has carried his burden of proving purposeful discrimination.

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[7](...continued)
this contention.

> This final step involves evaluating "the persuasiveness of the justification" proffered by the prosecutor, but "the ultimate burden of persuasion rests with, and never shifts from, the opponent of the strike."

Rice v. Collins, 546 U.S. 333, 338 (2006) (citations omitted).

The parties do not dispute that Bond made a *prima facie* showing that the prosecutor exercised a peremptory challenge on the basis of race or that the prosecutor gave a race-neutral explanation for the challenge. The dispute thus turns on whether Bond carries his burden of proving purposeful discrimination. The burden at this step three is to show that it is more likely than not that the prosecutor struck at least one juror because of race. *See Wilson v. Beard*, 426 F.3d 653, 670 (3d Cir. 2005). At step three, "the trial judge must make a finding regarding the [prosecutor's] motivation." *Bronshtein v. Horn*, 404 F.3d 700, 723 (3d Cir. 2005).

b. Standard of Review for *Habeas* Petitions

We first address the threshold question of whether to apply the deferential AEDPA standard of review. The Commonwealth would have us answer that question "yes." Bond disagrees and asks us to apply a *de novo* standard of review.

Their dispute centers on whether the state courts reached the third part of the *Batson* analysis and resolved it on the merits. If the state courts performed a step-three analysis and made a finding about the prosecutor's intent, that finding is presumed correct, *see* 28 U.S.C. § 2254(e)(1), and Bond is entitled to relief only if (1) the state court decision was "contrary to," or involved an "unreasonable application" of, Supreme Court precedent, *id.* § 2254(d)(1); or (2) the finding was unreasonable in light of the record before the state court, *id.* § 2254 (d)(2); or (3) Bond rebutted that finding with clear and convincing evidence in the District Court, *id.* § 2254(e)(1). Failure to make a step-three finding, on the other hand, would render the state court's decision either "contrary to" or an "unreasonable application" of *Batson*, *see, e.g., Hardcastle v. Horn*, 368 F.3d 246, 259 (3d Cir. 2004), and we would not apply AEDPA deference. We would review the issue *de novo* with the exception that we would review relevant factual findings made by the District Court for clear error. *See Whitney v. Horn*, 280 F.3d 240, 249 (3d Cir. 2002).

(i) Relevant Background

The issue of race first arose at *voir dire* when the prosecutor complained about defense counsel's strikes of white venirepersons. The trial court rejected the prosecutor's complaint, noting instead that it was concerned about his (the prosecutor's) actions because he had stricken four of the five

black venirepersons he had an opportunity to accept.

Defense counsel raised their first *Batson* challenge after the prosecutor struck the next black member of the jury pool. The court noted that the prosecutor had stricken five of six black venirepersons, but only three of their 15 white counterparts, and that "there's clearly a propensity on the Commonwealth to strike black jurors." At defense counsel's urging, the court asked the prosecutor to state his reasons for striking two of the black venirepersons (Kim Clark and Geraldine McLendon).

When the prosecutor asked if the court was ordering him to do so and finding a *prima facie* case, the court said, "I'm not sure what I'm going to do at this point. . . . I don't start out discussing anybody's motives, but I think it's a reasonable request. Maybe you ought to tell me that, and we'll take it from there." The prosecutor stated, with respect to Clark, that she "did not want to be here. . . . She did not seem very enthusiastic about the proceedings and merely did not want to be here. I did not like the way she related to me. Two of the white jurors I struck had the same problem. . . . I did not like the way that they came off to me. That was the reason I struck her." Turning to McLendon, the prosecutor claimed she "equivocated as far as the death penalty was concerned. I was not completely confident with her answer. She said,

[']if necessary.[']" Defense counsel then asked the court to seat McLendon, arguing that she was "a lot more solid a citizen than the lady that we seated a month and a half ago [during Bond's first trial]. . . . It just would seem to be no neutral reason for striking Miss McLendon." The prosecutor argued that McLendon was similar to a white venire-person he had stricken. The court said:

> I understand that. Except you've struck five out of six blacks when you've had the opportunity to, and you have struck – you only preempted three out of 15 whites. I'm not at this point going to find that [the prosecutor] is using his peremptory challenges to exclude black jurors, and I am not going to find at this time that it is racially motivated. However, . . . I'm highly conscious of my responsibility in that regard, and that's all it is. I do want to follow the appellate court cases. . . . And right now, with all respect to you, [the prosecutor], I think if we're close in any area, it's in the circumstances of the Commonwealth's exercise. I'm not finding at this point any *prima facie* case. So, we'll proceed.

The next day, after the prosecutor struck five more black venirepersons, defense counsel raised

their second *Batson* challenge. It pertained to three members of the venire (Brian Reed, William Williams and Nicole Gilyard). The court noted that the prosecutor had accepted two black venirepersons, who were selected, and a third, who was stricken by the defense, but had stricken nine of the 13 black venirepersons whom he had an opportunity to accept. Defense counsel contended that a pattern had been established, prompting the court to want to hear from the prosecutor.

The prosecutor called the choice to strike Reed "obvious" in light of Reed's apparent concerns about imposing the death penalty. The court agreed, saying "I think that's clear." The prosecutor stated that he had stricken Williams because, although otherwise "ideal," he "gave me shock" when he "equivocated" about the death penalty. Finally, with respect to Gilyard, the prosecutor noted that he was "very concerned with the nature of the close relationship she had with the person accused of a robbery. . . . The fact that she seemed to have a close relationship, saw a person every day who committed a robbery, that really turned me off and that's why I didn't want her." The prosecutor then volunteered that he thought Gilyard different from a white juror he accepted who had testified as a character witness on behalf of a co-worker accused of manslaughter. He said: "I just thought that he was a co-worker and did not have the close relationship with this individual had with the person who was accused of robbery." The trial court

said "I presume you're saying . . . that their race played no part in your –," to which the prosecutor responded "[n]one whatsoever."

Bond's counsel rejoined that the aforementioned white juror also "was questionable" about whether he could impose the death penalty, and thus "the same reasons the Commonwealth is using to strike people he seems to avoid when it's a white potential juror." The court then said: "I'm not going to try and get into [the prosecutor's] mind, and I don't think it's appropriate really for you to. What I need from him is some objective statement that's racially neutral. . . . I'm satisfied that he has given it at this juncture."

The court then heard from counsel for Bond's co-defendant, who joined in Bond's counsel's argument and added that "assuming we get to the establishment of a pattern, one of the three criteria the Commonwealth must meet to overcome that presumed or assumed pattern is that the reason they give is racially neutral and that there is a basis for them and they are not just made up out of whole cloth. . . ." Co-defendant's counsel also argued that it was inconsistent for the prosecutor to strike a black venireperson because she knew an accused robber but accept a white venireperson who testified on behalf of a co-worker accused of manslaughter: "[T]hat flies in the very face of the reasons given. . . . And I think there you have a fabricated reason by the Commonwealth. There

they have failed to give a racially neutral reason, and in so failing, I would say that the redress . . . is to seat that juror."

The prosecutor replied by reiterating his argument that the white venireperson's relationship with a criminal defendant did not seem to him as close as the black venireperson's comparable relationship, and also that the white juror had not equivocated regarding the death penalty. The trial court ruled:

> Okay. I am satisfied that the explanation is racially neutral. I do find *prima facie* – by the exercise of its peremptory challenges as set forth, that there is some *prima facie* evidence of the Commonwealth striking black jurors because of race. And I'm satisfied at this point that no further action is warranted. . . . But in any event, I am satisfied that [the prosecutor's strike of Gilyard] prevails and we should move on to the next juror.

Voir dire proceeded. After the prosecutor struck another black venireperson, Joyce Hinton, defense counsel (prompted by the court) raised their third and final *Batson* challenge. The court said: "I have already found that a *prima facie* case does exist of a pattern used by the Commonwealth to exclude jurors because of race. And I'll permit

[the prosecutor] to explain this particular instance." The following then transpired:

THE PROSECUTOR:	Judge, I was all set to accept this juror, except I asked the witness when she hesitated, clearly hesitated about the death penalty.
THE COURT:	She didn't hesitate one bit, in this Court's opinion.
THE PROSECUTOR:	In my opinion, she most –
THE COURT:	Okay. I understand that. In other words, she was asked that question by [counsel for the co-defendant]. She was asked it by you. And then you asked what you always ask, ["A]re you sure?["]

The prosecutor argued in support of asking witnesses whether they are "sure" about the death penalty, but the trial court ordered him to refrain from doing so. The following then transpired:

THE COURT:	You've indicated that you think this juror has

hesitated on the death penalty issue and that's why you exercised your peremptory challenge.

THE PROSECUTOR: No, that is not why I exercised it.

THE COURT: Well, why did you?

THE PROSECUTOR: She resented my asking, ["A]re you sure[?"] She's the first witness of this entire two days who took offense when I asked the question. I did not mean to offend her, but that's the ultimate question in this case.

THE COURT: All right. You don't have to say any more. I'm satisfied that the explanation is racially neutral. I'm not saying that I necessarily agree with it except to the extent that there was something that occurred at the end of that questioning that could have made counsel

> hesitate over this precise juror and the manner in which that question was asked and responded to. Accordingly, I continue my finding that the Commonwealth is indeed – that there is indeed a *prima facie* case of excluding jurors because of race, but I'm satisfied at this point that that's racially neutral. And I'll permit the strike. You may call the next juror.

The trial court revisited the *Batson* issues on post-trial motions. It held:

> *Batson* was first raised here by defendant Bond after the Commonwealth had struck nine out [of] a possible thirteen black jurors. The court then found that this pattern established a prima facie case that the Commonwealth was using its peremptory challenges to remove black jurors and asked that the Commonwealth explain its reasons for challenging black jurors. At the defendant's request[,] the Commonwealth explained its reasons for striking three black jurors. . . .

> The court found these reasons to be racially neutral and permitted the three strikes. After being challenged a second time[,] the prosecutor explained his tenth strike. . . . Here too the court found the reason to be racially neutral. The jury after completion of the selection process consisted of four black people, out of a possible fourteen, and eight white people. Reviewing the totality of the circumstances[,] there is no showing of intentional discrimination by the prosecutor in the jury selection process and defendants are not entitled to a new trial on that basis.

Opinion Denying Post-Trial Motions at 6-7, Case Nos. 1783-1791, 1821-1828 (Ct. C.P., Philadelphia County, Oct. 5, 1993) ("Post-Trial Motions Opinion").

The Pennsylvania Supreme Court reviewed Bond's *Batson* challenges on direct appeal. It wrote:

> When each of the explanations as set forth above was offered by the prosecutor, the trial judge, who was present throughout the entire voir dire, accepted the explanations as legitimate and race neutral. Appellant does

> not now offer any specific arguments as to why a particular explanation was not acceptable. Rather, appellant makes a generalized assertion that the reasons put forth by the Commonwealth were not racially neutral. Based upon our review of the record we find no reason to disturb the findings of the trial court as to the legitimacy of the race neutral responses offered in this case.

Commonwealth v. Bond, 652 A.2d 308, 310-11 (Pa. 1995).

The PCRA court refused to consider a newly discovered videotape of a veteran prosecutor explaining how to get around *Batson* to younger attorneys in the office that prosecuted Bond. It summarized its previous *Batson* ruling as follows: "[F]ollowing a *Batson* challenge during jury selection, this court found no racial basis for the peremptory challenges by the prosecutor, a finding which was affirmed by the Pennsylvania Supreme Court." Opinion Denying Petition for Post-Conviction Relief at 3-4, *Commonwealth v. Bond*, Case No. 1783, 1/2 (Ct. C.P. Philadelphia County, Jan. 26, 1998) ("PCRA Opinion"). The Pennsylvania Supreme Court affirmed. It characterized its prior *Batson* ruling as follows: "On direct appeal, this Court held that the prosecutor had articulated

race-neutral reasons for the use of peremptory challenges." *Bond*, 819 A.2d at 48 n.8.

(ii) Whether State Courts Reached Third Step of *Batson* Analysis

The state courts repeatedly failed to identify the three steps of the *Batson* analysis explicitly. This renders our task harder on review, as we must attempt to discern whether those courts did in fact perform each step.

The record certainly gives serious cause for concern that the state courts did not reach the third step of the *Batson* analysis. Most troubling, the trial court stated that it was "not going to try and get into [the prosecutor's] mind" and suggested that it only needed "some objective statement that's racially neutral." This seems to indicate that the trial court believed that it could stop after the prosecutor satisfied the second step of the *Batson* analysis by stating a race-neutral explanation for a strike. The *voir dire* transcript never explicitly clarifies whether, in accepting explanations to be race-neutral, the trial court or the Pennsylvania Supreme Court believed that the prosecutor truly had acted in a race-neutral fashion (satisfying step three of the *Batson* analysis), or merely that the stated explanations were race-neutral (at step two).

Having reviewed the state court record closely, however, we conclude that the trial court

and the Supreme Court both reached the third step of the *Batson* analysis and resolved it in favor of the Commonwealth. The trial court may have stated its resolution of the *Batson* analysis inartfully during *voir dire*, but its order denying post-trial motions shows that it reached *Batson*'s third step. It wrote: "Reviewing the totality of the circumstances there is no showing of intentional discrimination by the prosecutor in the jury selection process and defendants are not entitled to a new trial on that basis." Post-Trial Motions Opinion at 7. The reference to a "showing of intentional discrimination" puts this conclusion within step three of the *Batson* analysis. Here, the trial court does more than conclude that the prosecutor offered a race-neutral explanation for a strike; it concludes that Bond did not meet his burden of showing that purposeful racial discrimination, not the proffered explanation, actually motivated the prosecutor's conduct. This step-three conclusion indicates that the trial court indeed did understand the steps of a *Batson* analysis.

The Pennsylvania Supreme Court essentially incorporated the reasoning of the trial court, although it did not make specific mention of the opinion denying the post-trial motions. It described the trial court as accepting the prosecutor's explanations as "legitimate and race neutral," and referred to the trial court's findings "as to the legitimacy of the race neutral responses offered in this case." The emphasis on legitimacy demonstrates that the

Supreme Court considered the third step of the *Batson* analysis. Had it stopped at the second step it merely would have inquired into the existence of "race neutral" explanations or responses. But it also described the legitimacy of those "race neutral" explanations. It considered, in other words, whether the prosecutor had told the truth when he offered race-neutral explanations. It concluded that he had done so. This amounts to a determination on the merits at the third step of the *Batson* analysis. We therefore apply the deferential AEDPA standard of review. *Cf. Taylor v. Horn*, 504 F.3d 416, 433 (3d Cir. 2007) (explaining that AEDPA deference applies to implicit as well as explicit factual findings).

c. Analysis of *Batson* Claim

(i) Evidence Presented to the State Courts

Bond argues that the *voir dire* transcript shows that: (A) the prosecutor struck black venirepersons and accepted white venirepersons disproportionately; (B) the prosecutor asked black venirepersons more, and different kinds of, questions than white venirepersons; and (C) the prosecutor's stated reasons for striking certain black venirepersons were inconsistent with his acceptance of certain white venirepersons or otherwise appear pretextual. The Supreme Court has recognized that these factors are relevant on the issue of

discriminatory intent. *See Miller-El v. Dretke*, 545 U.S. 231, 240-63 (2005).

(A) Disproportionate Strikes

The trial court conducted two days of *voir dire*. Each panel included forty venirepersons. The *voir dire* transcript and case record do not show conclusively the race of many of these individuals. They do reveal the following, however: (1) the jury consisted of eight white and four black members, with two black alternates;[8] (2) the venire panel on day one included 10 black and 30 non-black venirepersons; and (3) the prosecutor used 11 of his peremptory strikes against black venirepersons, 3 against white venirepersons, and one against an hispanic venireperson.

These raw statistics do not provide a clear picture of intentional racial discrimination. The higher number of strikes against black venirepersons raises concern but, as the Commonwealth notes, black jurors ultimately formed a larger percentage (33%) of the jury than they did of the only venire panel whose racial composition we know (25%). This comparison becomes even more

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[8]The Pennsylvania Supreme Court concluded on direct appeal that the two alternates were black. Bond has not challenged that finding.

favorable for the Commonwealth when we add the alternates to our consideration (43% versus 25%).

The parties dispute the number of black venirepersons that the prosecutor had the opportunity to strike. Bond believes this number to be 15, the Commonwealth 17. It appears that the prosecutor accepted at least seven of these venirepersons (the four black jurors, the two black alternates, and one black venireperson struck by the defense). This means that the prosecutor accepted somewhere between 41% (7 of 17) and 47% (7 of 15) black venirepersons that he had the opportunity to strike. Bond contends that this compares unfavorably to the Commonwealth's acceptance of white venirepersons, which it characterizes as an 83% rate. Assuming this to be correct, we certainly recognize the disparity between that rate and the 41%-47% rate for black venirepersons. This raises an inference of intentional racial discrimination. That inference does not have much strength, however, in light of the ultimate number of black jurors (and alternates), and the reasonably high rate of accepting black venirepersons. Both factors distinguish this case from *Miller-El*. *See* 545 U.S. at 240-41 (noting that the prosecutor accepted only 9% of the black venirepersons he had an opportunity to accept and that, while approximately 20% of the venirepersons were black, only one of 108 black venirepersons actually served on the jury).

(B) Disparate Questioning

Bond's argument regarding the disparate questioning of venirepersons suffers from the threshold problem that we do not know the race of each of the venirepersons. Bond thus cannot provide a detailed analysis of the questions posed to the venire pool as a whole. He relies on comparisons between stricken black venirepersons and seated white jurors, both for the substance of questioning and the number of questions posed. He does not explain why other factors, such as job stability or roots in the community, could not account for these differences. That five black stricken venirepersons were asked whether they were "sure" they could impose the death penalty raises an inference of intentional discrimination. But that inference is not particularly strong, as even Bond concedes that the Commonwealth posed the question to at least two non-black venirepersons. Nothing identified by Bond provides a close comparison to *Miller-El*. In that case, 6% of white venirepersons, compared to 53% of black venirepersons, were given a graphic description of the death penalty during questioning, *id.* at 255, and 100% of black venirepersons, compared to 27% of white venirepersons, were asked a trick question about imposing the death penalty, *id.* at 262. No equivalent difference in questioning occurred in this case.

(C) Pretexual Strikes

Bond contends that the prosecutor gave pretextual reasons for striking four specific black venirepersons: Kim Clark, Geraldine McLendon, Nicole Gilyard, and Joyce Hinton.

To repeat, the prosecutor stated that he struck Clark because she did not seem enthusiastic about the proceedings and did not want to be there. Bond argues that the record does not support this subjective reason. We agree with the Commonwealth, however, that the record is unlikely to indicate lack of enthusiasm or other such moods that the prosecutor may claim to discern. The trial court did not note any disagreement with the prosecutor's stated reason and Bond has not identified any white jurors accepted by the prosecutor despite a similar lack of enthusiasm. The prosecutor's strike of Clark thus provides little, if any, support for Bond's position.

Similar defects weaken Bond's argument regarding McLendon. The prosecutor stated that he struck her because she equivocated about her ability to impose the death penalty. Bond responds that the record reveals no such hesitation. The record is unlikely to reveal such pauses, however, and the trial court did not dispute the prosecutor's allegation of hesitation (as compared to its rejection, discussed below, of any suggestion that Hinton hesitated). Bond also argues that the

prosecutor contradicted his professed preference for jurors with children and stable work histories in striking McLendon (who met both preferences). Bond fails, however, to identify an accepted white venireperson with a similar background.

The prosecutor stated that he struck Gilyard because he was "very concerned with the nature of the close relationship she had with the person accused of a robbery. . . . The fact that she seemed to have a very close relationship, saw a person every day who committed a robbery, that really turned me off and that's why I didn't want her." Bond first argues that the record does not support the existence of a close relationship between Gilyard and the robbery defendant. We agree that the prosecutor may have exaggerated describing this relationship as "very close," but the record does show that the prosecutor reasonably could have believed that a close relationship existed between Gilyard and the robbery defendant: Gilyard identified the accused person as someone "close to" her and a friend whom she saw "practically every day."

Bond argues that two white jurors, Thomas Dunst and Mary Wetzel, also had a close relationship with individuals accused of a crime. The trial court did not hear argument regarding Wetzel, so we do not have available for review any explanation by the prosecutor on that point. Dunst had testified that a co-worker had been accused of manslaughter and that he testified as a character

witness on his behalf. The prosecutor stated that he did not strike Dunst because he was only a co-worker of the manslaughter defendant. This explanation is not inherently implausible and the subtle distinction identified by the prosecutor may reflect a legitimate, reasonable, non-race-based trial strategy. Even so, the failure to strike Dunst does raise concerns that the prosecutor gave pretextual reasons for striking Gilyard. The trial court did not express concerns about that strike, however, and accepted the prosecutor's explanation. Nothing in the record indicates that it was unreasonable to do so. Our review of the record also reveals that the trial court likely would have perceived no significant additional grounds for concern had Bond also pointed to the failure to strike Wetzel. That conclusion would have been reasonable. We thus conclude that the strike of Gilyard permits an inference of discriminatory intent, but that it is not a strong one.

The trial court did express concern about the strike of Hinton. The following exchange (which we also quote in full above) occurred:

> THE PROSECUTOR: Judge, I was all set to accept this juror, except I asked the witness when she hesitated, clearly hesitated about the death penalty.

THE COURT: She didn't hesitate one bit, in this Court's opinion. . . . You've indicated that you think this juror has hesitated on the death penalty issue and that's why you exercised your peremptory challenge.

THE PROSECUTOR: No, that is not why I exercised it.

THE COURT: Well, why did you?

THE PROSECUTOR: She resented my asking, are you sure. She's the first witness of this entire two days who took offense when I asked the question. I did not mean to offend her, but that's the ultimate question in this case.

THE COURT: All right. You don't have to say any more. I'm satisfied that the explanation is racially neutral. I'm not saying that I necessarily agree with it except to the extent that there was something that

> occurred at the end of that questioning that could have made counsel hesitate over this precise juror and the manner in which that question was asked and responded to. Accordingly, I continue my finding that the Commonwealth is indeed – that there is indeed a *prima facie* case of excluding jurors because of race, but I'm satisfied at this point that that's racially neutral. And I'll permit the strike. You may call the next juror.

Bond contends that this exchange reveals a change in positions by the prosecutor in that he first stated that he struck Hinton for hesitating and then stated that he struck her for taking offense at his question. The Commonwealth contends, to the contrary, that the trial court interrupted a single explanation of the strike: that, after Hinton hesitated, the prosecutor asked a follow-up question, to which Hinton took offense. The ambiguous transcript supports both readings. It does not allow us to discern whether Hinton indeed did resent the asking of the follow-up question. Even if she did not hesitate, the trial

court appears to have agreed that she resented that question. Any exaggeration about hesitation does not stop resentment of the prosecutor's question from being a legitimate basis for a strike. Were we to doubt that the prosecutor did in fact have that motive for striking Hinton, the record still would not allow us to do more than suspect improper motives. It does not make clear any unreasonableness in the trial court's acceptance of the prosecutor's stated reason.

* * * * *

Taken as a whole, the *voir dire* transcript raises legitimate concerns that the prosecutor struck black venirepersons disproportionately and gave pretextual reasons for doing so. We agree with the District Court's suggestion that reasonable minds could differ on the proper result of the third step of the *Batson* analysis with respect to the evidence before the state courts. That is not our inquiry, however. As discussed, we apply the deferential AEDPA standard. The possibility that we might have resolved this question differently had we sat as the trial court does not provide a basis for *habeas* relief under that standard. The trial court record does not allow us to conclude that the state court decisions were either "contrary to," or involved an "unreasonable application" of, Supreme Court precedent, *see* 28 U.S.C. § 2254(d)(1), nor that the state courts' findings were unreasonable in light of the record before them, *see id.* § 2254(d)(2).

We thus defer to the state courts' conclusion that Bond failed to meet his burden at the third stage of the *Batson* analysis on the record before the state courts.

(ii) Evidence Presented to the District Court

Bond also bases his *Batson* claim on evidence that he did not present to the state courts. We consider that evidence in two steps: first, evidence considered by the District Court, and second, evidence not considered by the District Court on procedural grounds.

(A) Evidence Considered by the District Court

The District Court held a hearing on two kinds of evidence that the Philadelphia District Attorney's Office had a policy of discrimination at the time of Bond's trial. Specifically, the court heard evidence that Assistant District Attorney Jack McMahon gave a videotaped training session explaining how to use race as a factor in jury selection, and that another Assistant District Attorney, Bruce Sagel, also trained members of the office to use race as a factor in selecting juries. The District Court concluded that this evidence did not indicate that the prosecutor in Bond's case struck venirepersons because of racially discriminatory intent.

The Commonwealth contends that the District Court should not have held a hearing as to these two types of evidence because the state courts concluded that a hearing was unnecessary as to the McMahon evidence and did not have the opportunity to review the Sagel evidence. This argument raises questions as to the propriety of the evidentiary hearing. Rather than decide those questions, however, we assume the best possible procedural posture for Bond: that we review the District Court's finding that the evidence was unpersuasive for clear error.[9] *See Cristin v. Brennan*, 281 F.3d 404, 409 (3d Cir. 2002). As discussed below, we conclude that Bond does not prevail even with the benefit of that assumption.

The Commonwealth does not attempt to defend the contents of the McMahon video. Instead, it argues that the District Court did not clearly err in concluding that the McMahon video did not show that the Philadelphia District Attorney's Office had a policy or culture of discrimination. The Commonwealth first points to the testimony of the prosecutor in Bond's case. He stated that he never saw the McMahon video, had not

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[9]The Commonwealth does not suggest that we may not make this assumption. It does not argue that the question of the propriety of an evidentiary hearing is jurisdictional or otherwise contend that we must address the procedural posture of this case rather than dispose of it on the merits.

heard of it before it became public, had never had any discussions with McMahon, and had not been trained by him. Bond's prosecutor also testified that no one had taught him to strike black jurors. The Commonwealth also presented the testimony of other members of the District Attorney's Office. They testified that: (1) the videotape represents McMahon's personal views, not those of the office; (2) the office policy was to follow the requirements of *Batson*; (3) only ten to fifteen assistant district attorneys actually attended the lecture seen in the videotape; and (4) while the videotape was available to new prosecutors, it was not part of a regular training program.

The District Court credited the prosecutor's testimony and, while acknowledging it to be a "reasonable inference" that such a policy existed, it "d[id] not conclude that it was the policy of the District Attorney's Office to discriminate on racial grounds in the process of selecting juries." *Bond v. Beard*, 2006 WL 1117862, at *3 (E.D. Pa. Apr. 24, 2006).

Bond's attempts to undermine that conclusion lack force. His arguments remain general and do not have significant persuasive effect regarding his specific case. Bond does not, for example, identify specific testimony that demonstrates that the prosecutor did not deserve the positive credibility finding made by the District Court. That Court, which gave the matter much attention, had the

opportunity to sit and listen to the prosecutor's testimony. We will not conclude that it committed clear error without some firmer indication of the prosecutor's lack of veracity than the general concerns voiced by Bond. Nor do we perceive error in the District Court's reference to a "policy of discrimination" rather than to a "culture of discrimination." Any difference between those phrases is irrelevant here, since the District Court implicitly found insufficient evidence of pervasive influence or pressure on prosecutors that pushed them toward *Batson* violations. The District Court concluded that the McMahon videotape had not affected the performance of the prosecutor in Bond's case. Even if, as Bond suggests, the District Court should have spoken in terms of the office's culture, rather than its policy, that would not change the Court's conclusion that Bond has not shown that the prosecutor had seen the videotape or otherwise been trained to avoid *Batson*.

The District Court also did not commit clear error in its treatment of the Sagel evidence. Bond's claim on that point referred to a magazine article based on handwritten notes taken by Assistant District Attorney Gavin Lentz in a training given by Sagel. Bond sought to establish the existence of a culture of discrimination through these notes. However, both Lentz and Sagel testified in the District Court that the lecture did not include instructions to strike venirepersons because of their race. Lentz also testified that he did *not* believe that

there was a "pervasive culture of discrimination in the office[.]" Given this testimony that contradicts Bond's depiction of the Sagel training as equivalent to the McMahon lecture and that denies the existence of a culture of discrimination, the District Court did not clearly err in deciding that this "additional evidence," like the McMahon videotape, does not support a conclusion that the District Attorney's Office had a culture of discrimination.

(B) Evidence Not Considered by the District Court

Bond also presented a statistical study to the District Court. He argues that this study, performed by Professors David Baldus and George Woodford, demonstrates that the Philadelphia District Attorney's Office struck black venirepersons at a 33% higher rate than non-black venirepersons. He asserts that it shows that Bond's prosecutor had stricken 55% of black venirepersons as opposed to 22% of non-black venirepersons. The District Court refused to consider this evidence because of Bond's failure to present it to the state courts.

We do not decide the question whether the District Court could have considered this evidence.[10] Even if introduced, this survey, considered

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[10]As with our assumption regarding the permissibility (continued...)

either individually or as part of the record as a whole, would not change our evaluation of the merits of this claim. As the District Court explained, Bond bears the ultimate burden of establishing that the prosecutor in his case intentionally discriminated on the basis of race when he struck venirepersons. The Baldus study permits an inference that the District Attorney's Office tends to strike black venirepersons more often than non-black venirepersons and that Bond's prosecutor has demonstrated a similar tendency. But each court to consider the prosecutor's conduct in this specific case has concluded that the prosecutor did not discriminate intentionally on the basis of race. Bond may not prevail on his *Batson* claim by relying on such general evidence as the survey when both state and federal courts have evaluated the prosecutor's specific motivations and found

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[10](...continued)
of an evidentiary hearing, we may make this assumption because, even if viewed as incorporating procedural default and exhaustion claims, the Commonwealth is not making a jurisdictional argument. *See Sweger v. Chesney*, 294 F.3d 506, 520 n.13 (3d Cir. 2002) (procedural default not jurisdictional); *Coady v. Vaughn*, 251 F.3d 480, 488 (3d Cir. 2001) (exhaustion not jurisdictional). Moreover, we likely could assume jurisdiction even if AEDPA's procedural bars arguably deprived us of jurisdiction. *See Bowers v. National Collegiate Athletic Ass'n*, 346 F.3d 402, 415-16 (3d Cir. 2003) (concluding that we must decide Article III jurisdictional issues prior to other issues, but that we may assume statutory basis of jurisdiction).

against Bond without making unreasonable factual determinations or committing clear error.[11]

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Taken as a whole, or individually, the evidence not considered by the state courts does not cast meaningful doubt on their *Batson* decision. Bond has failed to rebut their conclusions by clear and convincing evidence, *see* 28 U.S.C. § 2254(e)(1), and has given us no reason to revisit our decision to defer to their *Batson* analysis. Accordingly, Bond's *Batson* claim fails.

2. *Bruton* Claim

The Sixth Amendment to the United States Constitution, and specifically its Confrontation Clause, guarantees criminal defendants the right to confront the witnesses against them. The Supreme Court has explained that a defendant is denied his right to confront witnesses against him when a prosecutor presents a co-defendant's confession implicating the defendant at a joint trial and the co-defendant does not testify. *See Bruton v. United States*, 391 U.S. 123 (1968).

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[11]This logic applies equally to Bond's suggestion that we discern discrimination in this case from the fact that federal and state courts found *Batson* violations in other prosecutions conducted by the Philadelphia District Attorney's Office.

The prosecutor sought to introduce confessions provided by both Bond and his co-defendant at their joint trial. Bond's counsel negotiated an appropriate approach given the constraints imposed by *Bruton*. They and the prosecutor apparently agreed that the Commonwealth would introduce a redacted version of Bond's co-defendant's confession. This version replaced Bond's name with the words "another guy" at the points where Wheeler implicated Bond in his confession.

The prosecutor unfortunately failed to keep to the parties' agreement. He used the term "the killer" instead of the words "another guy" in his opening and, at the end of that address to the jury, identified Bond by name: "He [Bond's co-defendant] . . . admits that he saw Bond shoot and kill Mr. Lee." Bond's counsel moved for a mistrial and severance. The trial court rejected that motion. It instead instructed the jury that opening statements do not constitute evidence and allowed the trial to proceed. The Pennsylvania Supreme Court upheld the trial court's decision on appeal and in post-conviction proceedings. It concluded that the redactions were sufficient and that the prosecutor's identification of Bond was harmless error in light of the trial court's instructions to the jury and the independent evidence of Bond's guilt.

The District Court applied the AEDPA standard of review. *See* 28 U.S.C. § 2254(d)(1)-(2). It held that the state courts did not apply governing

law unreasonably in holding harmless any Confrontation Clause violation.

The Commonwealth does not contest the existence of error under the Confrontation Clause. It renews its argument, however, that any error was harmless. We thus turn to the same question posed to the District Court. But our analysis differs somewhat in light of *Fry v. Pliler*, 551 U.S. ___, 127 S.Ct. 2321, 2328 (2007), which the Supreme Court issued after the District Court's opinion. *Fry* instructs us to perform our own harmless error analysis under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), rather than review the state court's harmless error analysis under the AEDPA standard. *See Fry*, 127 S.Ct. at 2328.

The Supreme Court explained in *Brecht* that an error is harmless if it did not have "substantial and injurious effect or influence in determining the jury's verdict." 507 U.S. at 637 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). "Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice." *Id.* (quotation marks omitted). "When a federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had substantial and injurious effect or influence in determining the jury's verdict, that error is not

harmless." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995) (quotation marks omitted).

We conclude here that the error was harmless under *Brecht*. The prosecutor's conduct raises serious questions as to his willingness to respect Bond's rights under the Confrontation Clause.[12] Yet, the Commonwealth presented such extensive evidence of Bond's guilt that the error could not have had a substantial and injurious effect or influence in determining the jury's verdict. Kim, who had an unobstructed view of the shooter during the robbery, identified Bond. He testified at trial that he was "absolutely certain" that Bond had shot Lee. Sheppard also gave detectives a statement before trial identifying Bond as the shooter (although she did retract that statement at trial). Finally, Bond himself confessed to the crime but contended at trial that the police had coerced this confession from him. Wheeler's confession added little to this compelling evidence against Bond, particularly since he provided an alibi defense and his counsel suggested in closing that Wheeler's confession had been coerced. The jury could have

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[12]The District Court observed that at least one other Philadelphia prosecutor has made an "inadvertent" disclosure comparable to the one at issue in this case. We share the District Court's concern about possible cynical motives behind these "slips." The harmless error standard may protect a judgment of conviction but it does not excuse attorney misconduct.

acquitted both defendants by crediting Wheeler's alibi and concluding that Bond and Sheppard told the truth on the stand. It clearly did not do so. This leaves no basis for a "grave doubt" as to the harmlessness of the error. *See id.*[13] The prosecutor's erroneous conduct, while regrettable, thus does not provide a basis for *habeas* relief.

3. Jury-Instruction Claims

a. Reasonable Doubt

Bond contends that the trial court failed to explain that the Commonwealth had to prove each and every element of murder beyond a reasonable doubt. This failure, he argues, violates Pennsylvania law and provides a basis for *habeas* relief in

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[13]This logic applies equally to Bond's contention that "another guy" is an obvious redaction that violated *Gray v. Maryland*, 523 U.S. 185 (1998), by revealing that the police knew the identity of the shooter. We note that Bond appears to have waived this argument by agreeing to this redaction and not objecting at trial. Moreover, even if we considered this argument and concluded that *Gray* had been violated, any implication that police knew the identity of the killer would be irrelevant in light of the prosecutor's actual identification of Bond as the shooter. As discussed, we hold that identification to be harmless. We perceive no cumulative effect of the two errors (the implication that police knew the identity of the shooter and the actual identification of Bond) that would allow relief when each error is individually harmless.

that appellate counsel's failure to raise this point was ineffective assistance of counsel.

The trial court's opinion denying the PCRA petition does not discuss this issue and does not list it among the claims raised by Bond. The Pennsylvania Supreme Court denied Bond's PCRA appeal, holding that Bond had waived the underlying jury instruction claim by failing to raise it on direct appeal. *Bond*, 819 A.2d at 40 & n.3. It noted that Bond had not framed that issue as a question of counsel's ineffectiveness except in "a one-sentence statement at the conclusion of the argument . . ., baldly asserting that all prior counsel were ineffective for failing to litigate the issue." *Id.* at 40. The trial court explained that "[s]uch boilerplate allegations tacked on to waived claims of trial court error do not discharge appellant's burden of proving ineffectiveness." *Id.*

The resolution of this issue by the state courts led the District Court to conclude that this claim "has not been exhausted, and has been waived." *Bond*, 2006 WL 1117862, at *7. Bond contends that the doctrine of "relaxed waiver," which prevailed in Pennsylvania at the time of the state-court decisions, makes any state-law procedural ground inadequate to bar consideration of this claim in federal court. *See, e.g., Jacobs v. Horn*, 395 F.3d 92, 117 (3d Cir. 2005) (explaining effect of relaxed waiver doctrine). We affirm even

assuming that we may reach the merits of this claim.

The trial court failed to instruct the jury as clearly as it could that, to convict Bond of first-degree murder, it must find the existence of each of the elements of that crime beyond a reasonable doubt. The Pennsylvania Supreme Court has explained the necessity (under Pennsylvania law) of instructing the jury that the reasonable doubt standard of proof applies to each element of a crime. *See Commonwealth v. Bishop*, 372 A.2d 794 (Pa. 1977). It held that a general instruction regarding reasonable doubt was not enough. *See id.* at 796-97. However, it did instruct future courts sitting in review of jury instructions to read the charge as a whole. *See id.* at 796.

Here the jury instructions as a whole explained that the jury must find the presence of each element of first-degree murder beyond a reasonable doubt. First, the trial court instructed: "[I]t is the Commonwealth that always has the burden of proving each and every element of each of the crimes charged and that the defendants are guilty of those crimes beyond a reasonable doubt." This portion of the charge concededly could have been better. The trial court could have added the words "beyond a reasonable doubt" after the word "charged," making it clear that the "reasonable doubt" standard applied to each of the elements. But it did not need to do so. The instruction

provides the jury no basis for believing that, while a reasonable doubt standard applies to proof of the crime, some lower standard applies to proof of the individual elements. The common sense way to read this portion of the charge is that the Commonwealth has to prove each element of the crime and that it must do so beyond a reasonable doubt.

This logical reading of the quoted portion of the charge is supported by the rest of the instruction. First, the trial court repeated the beyond-a-reasonable-doubt standard on numerous occasions, reinforcing the implication that it was the relevant standard for the jury's deliberation. Second, the trial court stated with respect to other charged crimes that the Commonwealth had the burden of proving each element beyond a reasonable doubt, reinforcing that principle in the jurors' minds. Finally, the trial court did refer to both the beyond-a-reasonable-doubt standard and the need to prove each of the elements in the homicide charge, albeit separately. Considering these factors along with the above-quoted portion of the instruction, we have no doubt that the charge, read as a whole, properly instructed the jury that it had to find each element of first-degree murder beyond a reasonable doubt.

We thus conclude that any claim brought under *Bishop* and its progeny would have failed on appeal in state court. This defeats any ineffective assistance of counsel claim since there is no

reasonable probability that the outcome of the state proceeding would have been different but for the failure of counsel to raise this jury instruction claim. *See, e.g., Albrecht v. Horn*, 485 F.3d 103, 128 (3d Cir. 2007) (stating that, to prevail on an ineffective assistance of counsel claim, a petitioner must establish prejudice by showing a reasonable probability that, but for attorney error, the outcome of the proceeding would have been different).

b. Accomplice Liability

We also reject Bond's accomplice liability argument. The trial court's instructions were deficient on that question. It failed to instruct the jury that, to find Bond guilty of first-degree murder as Wheeler's accomplice, it must conclude that Bond himself had the specific intent to kill. Its instructions, as a whole, suggested that Bond was guilty of first-degree murder if Wheeler had the intent to kill and Bond was Wheeler's accomplice in the robbery. This was error because jury instructions violate a defendant's constitutional right to due process if they allow a jury to convict him of first-degree murder without finding that he had the specific intent to kill required by statute. *See, e.g., Smith v. Horn*, 120 F.3d 400 (3d Cir. 1997).

We review this type of instructional mistake for harmless error, asking whether it had a substantial and injurious effect or influence in determining the jury's verdict. *See, e.g., O'Neal*, 513

U.S. at 436. The jury in this case returned a first-degree murder verdict against Bond but only a second-degree murder verdict against Wheeler. First-degree murder is the killing of another with malice and a specific intent to kill. *Commonwealth v. Tolbert*, 670 A.2d 1172, 1179 (Pa. Super. Ct. 1995). Second-degree murder is the killing of another with malice during the commission of a felony. *Id.*

The jury could not have held Bond liable as Wheeler's accomplice because it found Bond guilty of first-degree murder and Wheeler guilty of second-degree murder. Even under the deficient jury instructions, only if it found Wheeler guilty of first-degree murder could the jury have found Bond guilty of first-degree murder under the accomplice liability theory. Put in layperson's terms, the jury found Bond was the killer and Wheeler the lookout. Bond thus cannot receive relief for any instructional error on accomplice liability. Nor was his counsel ineffective for failing to raise this claim upon appeal, as he could not have prevailed. *See, e.g., Albrecht*, 485 F.3d at 127-29.

B. The Commonwealth's Appeal of the Vacation of Bond's Death Sentence

The Commonwealth cross-appeals the District Court's decision vacating Bond's death sentence and remanding for another penalty hearing.

The parties agree that this claim turns on the interpretation of *Strickland v. Washington*, 466 U.S. 668 (1984). That case allows relief for constitutionally ineffective assistance of counsel when counsel has provided deficient representation and that deficiency has prejudiced the defendant. The parties also do not dispute that the deferential AEDPA standard of review applies. We therefore ask whether the Pennsylvania Supreme Court interpreted *Strickland* unreasonably or made unreasonable factual determinations when it decided that Bond received constitutionally effective counsel at the penalty phase.

1. Background of the Ineffective Assistance of Counsel Claim

Bond claims that his trial counsel was ineffective because they conducted an inadequate investigation prior to the penalty phase and as a result failed to present sufficient mitigating evidence at the sentencing hearing. He argues that counsel should have presented evidence of his poor mental health and dysfunctional family in support of relevant statutory mitigating factors. We recount in detail the events at issue to provide appropriate context before turning to our analysis of this claim.

a. The Penalty Phase Hearing

(i) Mitigation Testimony

Bond's counsel called seven family members and friends at the penalty phase hearing. They testified generally to Bond's good character and willingness to help others. Their testimony included the following.

- Bond's mother, Queenie Victoria Bond Connor, lived with Bond's father for the first six years of Bond's life, at which point the father walked out. Bond later developed a close relationship with his mother's then-husband, Charles Connor. The death of Connor greatly saddened Bond. Bond's oldest brother Robert helped discipline Bond and his other siblings. (Bond has five older siblings – Robert, Terry, Tony, Alphonso, and Carolyn.)

- Bond dropped out of high school because he was beaten up repeatedly. A few gangs operated in their neighborhood. Gang members beat him up because he did not join a gang.

- Bond was a good and fun-loving child. He used to play harmless practical jokes. He treated his elders with

respect. He helped his mother after doctors diagnosed her with diabetes and ran errands for other people in the neighborhood without accepting any payment.

- Bond babysat his sibling's children. He participated in the Job Corps and had a series of jobs at restaurants and at a nursing home that he lost or left for various reasons. He could not join the military because he failed the General Educational Development test ("G.E.D.") by one point. He had stayed out of trouble prior to the robberies and murders that culminated in Lee's murder.

- Bond has five children. Their mother, a gambler and drug user, lacks money to provide them with adequate food. He was attempting to gain custody of the children when police arrested him for Lee's murder.

(ii) Penalty Phase Argument

The Commonwealth did not present evidence at the penalty phase or cross-examine the witnesses for Bond. It argued for the existence of aggravating factors on the basis of the trial testimony and a stipulation that Bond had been

convicted and sentenced to life in prison for the second-degree murder and robbery of a restaurant owner that he committed ten days prior to the murder of Lee. It suggested in closing that the jury should hold Bond's "good core of family" against him, arguing that he deserved the death penalty considering how "many people have much more horrible backgrounds."

In contrast, counsel for Bond stressed his good qualities, his willingness to help others, his age and his lack of an extensive criminal history. Bond's counsel pointed to Bond's frustration at being unable to pass the G.E.D., the loss of his stepfather, his inability to gain custody of his children despite his willingness to work menial jobs, and the fear caused by living in a dangerous neighborhood. Bond's counsel stressed the severity of life imprisonment. He appealed to the jury's sense of charity and asked it not to impose the death penalty.

As noted above, the jury returned a verdict of death, which the Pennsylvania Supreme Court affirmed on direct appeal.

b. The PCRA Hearing

The trial court held a seven-day PCRA hearing that included lengthy consideration of Bond's claim that he had received ineffective assistance of counsel at the penalty phase hearing. Bond,

represented by new counsel, introduced school records reflecting a difficult childhood. Bond also presented testimony from three categories of witnesses: family and friends who testified to his dysfunctional family and awful childhood; his trial counsel who testified to their performance at the penalty phase hearing; and medical experts who testified to Bond's mental health problems.

School Records: Bond's school records demonstrate that he missed school on numerous occasions – accounting for as much as a third of individual school years – because of his impoverished background. A report card from first grade indicates: "[Bond] seems sleepy when he does come to school and is often unkempt." A school counselor visited Bond's home to investigate Bond's extensive absences when he repeated grade three at age ten. Bond's mother explained that he had not attended school because he did not have a coat. The counselor stressed to Bond's mother that she had a parental duty to send Bond to school and that the lack of a coat did not excuse his absences. The counselor had two more encounters with Bond's mother the next year. Bond's mother said on one occasion that Bond had missed school because the family had been without heat for two weeks and because he had been on the streets after she sent him out to work. She also noted some later absences on the ground that Bond had no shoes. The counselors lost sight of the family that summer, noting that it moved suddenly because "a

sibling was involved in a serious community incident." The counselor included a note to follow up in the fall, but the records do not indicate whether a counselor did so.

Family and Friends: Bond presented the testimony of six family members and friends at the PCRA hearing (his mother, each of his siblings except Alphonso, and Barbara Epperson). Their testimony painted a very different picture than that presented at the penalty hearing. Two points emerged.

First, Bond endured an extremely troubled and deprived childhood. Bond's siblings testified that their mother drank and gambled extensively and that she physically abused Bond. Bond's sister gave a sense of the violent atmosphere of the home, for example, by recalling an occasion on which her mother threw a knife at her. Bond's family members described his childhood as one of poverty, disrupted by periods in which the family lacked food, utilities, or adequate clothing. They discussed pervasive drug use in the home and the dangers caused by heavy gang presence in their neighborhood. They characterized their successes as the result of good fortune and their reliance on the church to which they belonged. They described Bond as having little to no chance of success given the character of his home and neighborhood. His mother testified, for example, about the absences from school caused by his unstable family

circumstances, described her inability to provide him adequate formula as a baby, and stated that he ate lead paint chips at certain points in his youth.

Second, Bond's trial counsel did not inquire into Bond's background in any meaningful fashion. Bond's family members described brief and perfunctory discussions with trial counsel between the guilt and penalty phases of the Lee murder trial. Trial counsel did not inquire into family dynamics or background, Bond's family explained, although they would have testified on those topics if asked. One of Bond's brothers testified that he spoke with trial counsel during the trial for the first murder Bond committed, but that they did not discuss Bond's background.

Bond's trial counsel: Bond also presented the testimony of James Bruno, Bond's appointed trial counsel, and Dean Owens, who served as second chair (*i.e.*, support counsel) during the Lee murder trial. Their testimony regarding their minimal preparation for the penalty phase largely echoed that of Bond's family members.

Testimony of James Bruno: He has practiced law since 1979, with a primary focus on criminal law. He represented Bond in four proceedings, including the Lee case. He spoke to Bond's family as a group for about 15 minutes during Bond's trial for the murder and robbery of another restaurant owner. He spoke with an unknown member of

Bond's family during the period between that murder trial and the Lee murder trial, and asked that all family members be available for a possible penalty phase. He did not talk with Bond's family again until after the jury returned the first-degree murder conviction Bond now challenges. He met with Bond's mother and one of his sisters in the late afternoon and early evening of the day of the verdict. He may have met with or called other family members at that time, but he did not recall doing so.

Bruno's plan at the penalty phase was to argue that a series of disappointments, such as Bond's failure to gain a G.E.D. and his stepfather's death, had triggered his crime spree. However, Bruno would have used the following information if he had it during the penalty phase: an expert opinion that Bond's capacity to appreciate that his actions were criminal or to conform his conduct to the requirements of the law was substantially impaired; an expert opinion that he had a developmental age of 11 1/2 at the time of the offense; evidence that he suffered from organic brain damage at the time of the offense and that the damage extended back to childhood; and testimony that a blow to the head in 1988 had exacerbated Bond's brain damage. Bruno possibly would have used (and at least would have explored) evidence that Bond's family was dysfunctional, that his mother drank heavily and gambled, and that she and her oldest son frequently beat her children, including

Bond. Bruno lacked all this information. Bruno gave Bond's family members the opportunity to tell him about Bond's background, but Bruno testified that he "never really sat down and said tell me about [Bond's] background."

Bruno did not obtain or review Bond's school records pertaining to his head injury prior to or during his trial. Also, nothing shows that he obtained or reviewed Bond's hospital records.

Bruno retained Allan Tepper, Ph.D., to evaluate Bond, particularly with regard to his capacity to understand *Miranda* warnings. Bruno did not talk with Tepper after he received Tepper's report and did not inquire into the tests Tepper had administered or anything Tepper had learned about Bond's background.

Bruno allowed Owens to handle the penalty phase because Owens's life experiences allowed him to describe the rehabilitative possibilities of life imprisonment to the jury, and because it appeared that Bruno had not "clicked" with the jury.

Testimony of Dean Owens: He became an attorney in 1982 and had handled approximately 2,000 criminal cases for the Defender Association of Philadelphia ("DAP") prior to the Lee murder trial. He second-chaired that trial so that he could qualify to represent capital defendants after DAP began

handling homicide cases. He understood his role to be that of an advisor to Bruno.

Preparation for the penalty phase did not begin in earnest until the jury returned its first-degree murder verdict. Bruno had expected a second-degree murder verdict and seemed shocked by the result. Owens helped Bruno during the interviews that occurred the evening before the penalty phase. He received no guidance from Bruno on how to conduct the interviews. Owens attempted to gather stories to establish three mitigating factors: Bond's youthful age, 42 Pa. C.S.A. § 9711(e)(4), his lack of extensive criminal history, *id.* § 9711(e)(1), and "[a]ny other evidence of mitigation concerning the character and record of [Bond] and the circumstances of his offense," *id.* § 9711(e)(8) (this last factor is known as the "catch-all" mitigating circumstance). Neither Owens nor Bruno asked about Bond's absences from school, abuse Bond suffered as a child, the head injury Bond sustained in 1988, or the family's alcoholism and living conditions.

Owens and Bruno decided the night before the penalty phase hearing to do a dual closing so that the former could share his understanding of the rehabilitative effects of incarceration. The trial judge rejected this plan. This caused an impromptu meeting with Bruno and members of DAP in a hallway. Owens realized that he lacked experience but believed that he should take the

lead role in the penalty phase because the trial had left Bruno exhausted. (Per Owens, Bruno looked like "someone had kicked him, [that] he had been kicked by a mule," after the verdict.) Several DAP lawyers disagreed with the decision that Owens would conduct the entire penalty phase, including the presentation of all evidence and argument.

Owens pulled together his thoughts quickly. The hallway discussion and preparation took no more than 15 minutes. He did not ask for further time to prepare for the hearing. He felt prepared when the hearing began but agreed in retrospect that he had not prepared sufficiently.

Medical experts: Three mental health experts testified for Bond at the PCRA hearing: Barry Crown, Ph.D.; Richard Dudley, M.D.; and Tepper. John Gordon, Ph.D., testified for the Commonwealth.

Testimony of Barry Crown, Ph.D.: He met with Bond for five hours and conducted a series of tests. Bond did not malinger during the testing. Bond has a mental age of 13 years, 5 months and an abstract reasoning age capability of 11 years, 5 months. This likely is an improvement from the time of the offense. Exposure to lead could have caused some of the developmental problems suffered by Bond. The head injury he suffered in 1988 could have caused brain trauma.

Bond has suffered from brain damage since childhood. His mother's abuse of alcohol may have caused pre-natal brain damage. Organic brain damage causes Bond to suffer from visual and auditory attention problems, to struggle with abstract problem solving, to act impulsively, and to have great difficulty understanding the long-term consequences of his actions. The record contains nothing suggesting that he did not suffer from these problems at the time he shot Lee. Bond's capacity to appreciate the criminal nature of his conduct and to conform it to the requirements of the law was substantially impaired at the time he shot Lee.

Crown acknowledged the following during the Commonwealth's extensive cross-examination: he almost always testifies for the defense in criminal trials. He did not meet with Bond's family or read any records before meeting with Bond. Nor did he ask Bond certain probative questions *(e.g.*, about his alcohol and drug use, his employment history, abuse he suffered as a child, and his family dynamics). Academics dispute the reliability of some of the tests he administered to Bond. Other professionals might score Bond differently on some of the tests. Other causes than brain damage might have contributed to Bond's poor test scores. Not all individuals who test poorly or suffer from brain damage commit serious crimes.

Testimony of Richard Dudley, M.D.: Bond suffered neglect, along with physical and

psychological abuse, as a child. His school records indicate severe cognitive impairment. Improvement in Bond's test scores correlates with the arrival of his stepfather.

Bond has little to no ability for abstract conceptualization, problem solving, or logical thinking. Bond likely suffered compromised cognitive functioning from birth, compounded by the history of abuse and neglect. The ingestion of lead paint chips, as well as fetal alcoholism, are consistent with a finding of organic mental deficit. The blow to Bond's head in 1988 could have exacerbated Bond's mental impairments.

Bond suffered from Post Traumatic Stress Disorder ("PTSD") and had extreme mental or emotional disturbance at the time he shot Lee. This substantially impaired Bond's ability to appreciate that his conduct was criminal or conform it to the requirements of the law. He believes that Bond acted impulsively and reflexively in shooting Lee. Potential causes of Bond's PTSD include the abuse he suffered as a child, being attacked by gang members, and the stillborn birth of one of his children.

On cross-examination, Dudley stated as follows. He lacked a number of documents at the time he examined Bond. Nothing in the record he reviewed proved that Bond suffered from abuse as a child and not just neglect. Poverty does not lead

necessarily to neglect or abuse. Bond actually scored well on the eighth grade language test, placing in the 51st percentile. Absenteeism explains some portion of his poor test results. Bond also appears to have given different accounts of his alcohol use to different people who examined him. He had a motivation to lie to Dudley.

Testimony of Allan Tepper, Ph.D.: Tepper examined Bond prior to the first murder trial. He had only discovery materials at the time. He tried to obtain information about Bond's background but could not do so. He lacked Bond's school and medical records when he drafted his report. Those records would have raised questions about the possibility of brain injury and the type of environment provided by Bond's family.

Tepper testified on cross examination as follows. He saw no evidence indicating that Bond did not understand the *Miranda* warnings given to him by police. He did not see evidence that Bond failed to understand the criminality of his conduct, but evidence suggested that he could not conform his conduct to the law. Tepper did not see evidence of an extreme emotional or mental illness when he evaluated Bond. The hospital and school records do not answer the questions they raise. Reasons other than organic brain damage could explain Bond's struggles. Bond scored above average on vocabulary and certain of his responses to Crowr. likely should have been scored higher.

Testimony of John Gordon, Ph.D. (for the Commonwealth): Gordon testified that the information relied on by Crown did not permit a diagnosis of organic brain syndrome or brain damage that significantly impaired Bond's ability to function. Crown administered some tests inaccurately and reported other results inaccurately. Test results were inconsistent in places. Properly scored, some tests would have put Bond in an average range, which would not comport with him having brain damage. Crown could have performed more tests to clarify his results but did not do so. Bond scored in the average, non-impaired range on the most sensitive test for brain damage. Bond can reason abstractly. Gordon could not conclude that Bond was malingering. Bond does not demonstrate impairment commensurate with brain damage or dysfunction. He scored better on right-brain activity, negating Crown's finding that the blow to Bond's head may have caused right brain impairment.

Gordon acknowledged the following on cross examination. Certain aspects of conducting various tests fall within the discretion of the tester; at least one aspect of Bond's testing performance is consistent with having suffered a blow to the head that caused loss of consciousness; Bond's hospital records relating to his head injury include indications consistent with his having sustained a brain injury; and Bond's impulsivity is consistent with brain damage.

c. The Pennsylvania Courts' Conclusion

The trial court denied the ineffective assistance claim within the PCRA petition. It concluded that the testimony of Crown and Dudley "was thoroughly refuted" by Gordon's testimony; Bond had not carried his burden of showing that he suffered from organic brain damage or PTSD at the time of the offense; and trial counsel presented sufficient mitigating evidence at the penalty phase to render any omission of further evidence non-prejudicial to Bond.

The Pennsylvania Supreme Court agreed. It concluded that trial counsel did not provide constitutionally ineffective assistance, in that they had "spoke[n] on a number of occasions with appellant and his family, but neither appellant nor his family members ever mentioned to counsel a history of abuse and family dysfunction." *Bond*, 819 A.2d at 45. It concluded that no "qualitatively better" course existed than that pursued by trial counsel, as the circumstances related by Bond and his family indicated that his "conduct in this case was aberrational and of recent vintage" and stemmed from the death of Connor (Bond's stepfather) and Bond's failure of the G.E.D. test. *Id.* The Supreme Court emphasized that Tepper had drafted a report for trial counsel prior to either of Bond's murder trials and that this report informed trial counsel of nothing "that would be helpful in terms of

mitigation evidence." *Id.* It characterized trial counsel's approach as "a reasonable strategy" that "proved to be unsuccessful," and disagreed with Bond's contention that his trial counsel did not begin preparing for the penalty phase until after the jury had returned its verdict. *Id.* at 46-47. It also rejected Bond's argument that his trial counsel performed deficiently in failing to present mental health mitigation evidence. *Id.* at 47. The Supreme Court concluded that trial counsel had explored the possibility of presenting mitigation evidence by retaining Tepper's services and that it was bound by the PCRA court's determination that Gordon's testimony had "thoroughly refuted" the testimony of Crown and Dudley. *Id.* at 47-48.

d. Proceedings in the District Court

The District Court heard extensive testimony at its hearing on Bond's *habeas* petition. However, only Dudley testified to the penalty phase ineffectiveness claim. He appeared briefly to testify that, from a mental health perspective, there was no basis upon which one could conclude that Gordon's testimony had "thoroughly refuted" his (Dudley's) testimony at the PCRA hearing.

The District Court concluded that it "is very clear that, if counsel had fulfilled their obligation of conducting a reasonable investigation, very significant evidence could have been presented to the jury in mitigation of the penalty." *Bond*, 2006 WL

1117862, at *8 (internal citation omitted). It read the record as demonstrating that Owens "had not given much thought to the specific questions he would ask each witness" and that the witnesses "were frequently surprised and caught off guard by the questions that were asked." *Id.* at*9. It saw no basis in the record for the PCRA court's conclusion that Gordon "thoroughly refuted" the opinions of Bond's expert witnesses and concluded instead that trial counsel was "patently ineffective in a constitutional sense for failing to investigate and to uncover readily available evidence in support of additional specific mitigating factors." *Id.* Finally, it noted that Owens apparently operated on the incorrect assumption that sympathy provides a basis for mitigation under Pennsylvania law. *Id.* at *10.

2. Governing Law

Strickland imposes a two-part test for ineffective-assistance-of-counsel claims. First, it asks whether counsel performed deficiently. *Id.* at 687. This measures deficiency against the standard of "reasonably effective assistance," as defined by "prevailing professional norms." *Id.* at 687-88. If a petitioner satisfies the first prong of *Strickland*, he then must show that "the deficient performance prejudiced the defense." *Id.* at 687. This requires that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Id. at 694. Bond's penalty phase proceeding would have reached a different result if one juror had voted to impose a sentence of life imprisonment rather than the death penalty. *See* 42 Pa. C.S.A. § 9711(c)(1)(iv).

Three Supreme Court applications of *Strickland* provide particularly relevant guidance in this case: *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); and *Rompilla v. Beard*, 545 U.S. 374 (2005). We discuss each below.

The *Williams* Court agreed with the state post-conviction court's decision that trial counsel had been ineffective at sentencing and that this ineffectiveness had prejudiced the defendant. 529 U.S. at 395-397. The Supreme Court described trial counsel's failings as follows:

> The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before the trial. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the

> criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody.

Id. at 395 (internal citation and footnote omitted). The Court continued to detail trial counsel's failure to introduce evidence that Williams was "borderline mentally retarded" or to seek his prison records, which included details that reflected well upon him. *Id.* at 396. These failings did not indicate a strategic decision and prejudiced Williams within the meaning of *Strickland*. *Id.* at 396. The Supreme Court concluded that the Virginia Supreme Court's opposite conclusion was both "contrary to" and "an unreasonable application of" clearly established law. *Id.* at 397.

In *Wiggins*, trial counsel "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." 539 U.S. at 524. The Court concluded that the Maryland Court of Appeals' "assumption that the investigation was adequate . . . reflected an unreasonable application

of *Strickland*." Id. at 528. It viewed the unreasonableness of the state court's decision as "highlight[ed]" by the "partial reliance on an erroneous factual finding." *Id.* While "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing," or "to present mitigating evidence at sentencing in every case," *id.* at 533, the Court concluded that counsel nonetheless had been ineffective. It based its decision on the principle that "'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.'" *Id.* (quoting *Strickland*, 466 U.S. at 690-91). The Court found deficient performance in counsel's conduct and concluded that the defendant had been prejudiced by the failure to present a stronger mitigation argument.

Counsel in *Rompilla* failed to examine a readily available prior-conviction file and thereby "seriously compromis[ed] their opportunity to respond to a case for aggravation." 545 U.S. at 385. The Court examined governing standards of attorney conduct and concluded that "[i]t flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the courthouse, open for the asking." *Id.* at 389. It found prejudice from this deficient performance because the defendant could have presented

a much stronger mitigation case. *Id.* at 390. It therefore reversed our Court's opinion to the contrary. *Id.* at 379-80 (describing our decision, *Rompilla v. Horn*, 355 F.3d 233 (3d Cir. 2004), as concluding that the Pennsylvania Supreme Court had not applied *Strickland* unreasonably since counsel had pursued their investigation far enough to leave them with reason for thinking that further efforts would not be a wise use of limited resources).

Our decision in *Outten v. Kearney*, 464 F.3d 401 (3d Cir. 2006), also guides our analysis in this case. Counsel in that case failed to present significant mitigation testimony at the penalty phase and did not call a witness to provide a comprehensive social or psychiatric history. *Id.* at 406-07. As a result, the jury did not hear of Outten's family issues, his neurological condition, his psychological problems, and his substance abuse. *Id.* at 410-12. Trial counsel instead argued to the jury that "he was a good guy and that his life should be spared because he was actually innocent." *Id.* at 415. Counsel ultimately abandoned this strategy in closing. *Id.* at 416. He instead mentioned Outten's "horrendous record" and described Outten as "guilty." *Id.* Counsel even "failed in closing to focus on the positive aspects of Outten's character." *Id.* In that context, we concluded that the Delaware Supreme Court applied *Strickland* unreasonably when it decided that (i) counsel had not performed deficiently and (ii), even if he had, this

deficient performance did not prejudice Outten. *Id.* at 419, 422-423.

We reached a comparable conclusion in *Jacobs v. Horn*, 395 F.3d 92 (3d Cir. 2005), in holding that Jacobs had shown deficient performance and prejudice under *Strickland*. We then turned to the question whether the contrary decision of the Pennsylvania Supreme Court was unreasonable such that AEDPA did not bar *habeas* relief. *Id.* at 106. That Court unreasonably applied *Strickland*, we held, in elevating one factor over other relevant factors. *Id.* It emphasized the finding of a psychiatrist while disregarding counsel's failure to provide that psychiatrist with relevant information. *Id.* Accordingly, we remanded for a new trial on one of the two murders with which the Commonwealth had charged Jacobs (concluding in the process that counsel did not provide ineffective assistance in defending Jacobs against the other murder charge). *Id.* at 119.

We ordered *habeas* relief as to the penalty phase, but not as to guilt, in *Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001). Jermyn argued that his counsel had provided ineffective assistance at the guilt phase by failing to introduce sufficient evidence of Jermyn's insanity. We agreed with the District Court that the Pennsylvania Supreme Court was not unreasonable to conclude that trial counsel effectively placed the issue of Jermyn's sanity in evidence and that Jermyn was not

prejudiced by the failure to introduce further, cumulative evidence on that point. *Id.* at 285. We also agreed with the District Court, however, that the Pennsylvania Supreme Court was unreasonable to conclude that trial counsel was not ineffective at the penalty phase. *Id.* at 305. The Supreme Court applied *Strickland* unreasonably, we explained, in concluding that counsel's failure to present available mitigating evidence did not prejudice Jermyn. *Id.* Noting that counsel "had been out of law school for less than two years, this was his first capital case, and he was 'overwhelmed' by the entire matter," *id.* at 308, we held counsel to be "ineffective because he failed to conduct an investigation, failed to prepare adequately for the penalty phase of Jermyn's trial, and consequently, failed to present substantial mitigating evidence that would have directly undercut the state's penalty phase case," *id.* at 306. Our conclusion largely rested on the extensive and "powerful" mitigating evidence that could have been presented, largely consisting of graphic accounts of physical abuse suffered by Jermyn that could have "provide[d] the jury with critical insight into the root of [his] mental illness," *id.* at 306.

3. Analysis of Bond's Ineffective Assistance of Counsel Claim

a. Deficient Performance

Trial counsel performed inadequately in preparation for and during the penalty phase of Bond's trial, falling below professional standards. We do not doubt that the prospect of representing a defendant at a capital penalty phase hearing can overwhelm even experienced lawyers. Nor does it surprise us that a first-degree murder verdict would disappoint defense attorneys who have worked hard during a trial. But that does not excuse trial counsel's failure to prepare for the penalty phase prior to the handing down of the conviction. These attorneys, particularly in the face of a record so full of testimony calling for a first-degree murder verdict, should not have waited until the eve of the penalty phase to begin their preparations.

Counsel's failure to think ahead caused them to fail to inquire meaningfully into Bond's childhood and mental health. They did not obtain readily available school records portraying a much troubled youth. Nor did they seek medical records or conduct a meaningful inquiry into Bond's family life. They therefore failed to give their consulting expert sufficient information to evaluate Bond accurately. *See Rompilla*, 545 U.S. at 392 (describing medical experts as unable to find mitigating

evidence because they were not provided adequate school, medical, and prison records). Trial counsel did not investigate possible mitigating circumstances or ask experts to do so. Instead, counsel conducted an *ad hoc* and perfunctory preparation for the penalty phase *the night before it began*. Their "strategy" relied on an uninformed guess as to the best available way to present Bond to the jury. We will not excuse this conduct on the ground that Bond and his family members did not tell counsel that his background provided fertile territory for mitigation arguments. Neither Bond nor his family had a duty to instruct counsel how to perform such a basic element of competent representation as the inquiry into a defendant's background. They did not, as the Commonwealth suggests, have to volunteer "red flags" about Bond's mental health when trial counsel should have discovered that information through a basic inquiry into his background.

The failure to perform a meaningful investigation violates prevailing professional norms as stated in the American Bar Association's Guideline for Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guideline") 11.4.1, which deals with investigations in capital penalty phases. It instructs counsel that an investigation for the penalty phase "should begin immediately upon counsel's entry into the case and should be pursued expeditiously," and that it should "comprise efforts to discover all reasonably available

mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." ABA Guideline 11.4.1(a), (c). *See also Outten*, 464 F.3d at 418 (discussing ABA Guideline 11.4.1 and explaining: "It was standard practice . . . for a death-eligible defendant's penalty phase investigation to include his medical history, educational history, family and social history, employment history, and adult and juvenile correction records."). Bond's trial counsel neither began their investigation at an appropriate time nor attempted to discover reasonably available mitigation evidence. They thus failed to meet prevailing standards of timeliness and quality.

Compounding the error of their failure to investigate, counsel decided at the eleventh hour that Owens, who never had participated in a death penalty case before, would take over full responsibility for the penalty phase. Bond, facing the ultimate penalty, should not have had counsel who was so inexperienced in this area and who improvised his penalty phase approach. We do not question Owens's dedication or zeal in representing Bond, but here no amount of good intentions makes up for his lack of experience and preparation.

In this context, we conclude that Bond's trial counsel provided him deficient representation at the penalty phase. The Pennsylvania Supreme Court applied *Strickland* in an objectively unreasonable fashion in concluding that counsel

performed adequately. Its holding rests in part on the unreasonable factual determination that trial counsel began meaningful preparations for the penalty phase at a point prior to the eve of the penalty phase. The record includes no evidence to that end. Instead, the PCRA testimony of trial counsel and potential and actual penalty phase witnesses flatly contradicts that view. Trial counsel may have had brief communication with family members during an earlier proceeding, but the record before us shows that they did not prepare adequately for a capital penalty hearing.

The Pennsylvania Supreme Court also incorrectly concluded that Bond wishes to second-guess a reasonable strategy that backfired. It is difficult to call Bond's counsel's decisions "strategic" when they failed to seek rudimentary background information about Bond. Strategy is the result of planning informed by investigation, not guesswork. The record does not support the suggestion that Bond's counsel's investigation met prevailing professional standards. With the investigation predicate so deficient, we must reject any lack-of-deficiency determination even under the deferential AEDPA standard. This conclusion accords with decisions of the Supreme Court, *see, e.g., Wiggins*, 539 U.S. at 527-28, and of our Court, *see, e.g., Outten*, 464 F.3d at 419.

b. Prejudice

As noted above, to show prejudice under *Strickland*, a petitioner must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. To repeat, for there to be a different result in this case, one juror would have had to vote for life imprisonment rather than the death penalty. *See* 42 Pa. C.S.A. § 9711(c)(1)(iv). We again apply the AEDPA standard of review, asking whether the Pennsylvania courts applied *Strickland* in an objectively unreasonable way when they concluded that any deficient performance did not prejudice Bond. *See Outten*, 464 F.3d at 419-23.

The Pennsylvania Supreme Court did not rule explicitly on the prejudice question because it resolved the ineffective assistance claim on the first prong of the *Strickland* analysis. It arguably addressed prejudice in considering the Commonwealth's rebuttal testimony on the topic of Bond's mental illness. Even if it did, however, it did not add further reasoning than that provided by the PCRA Court. In this context, we conclude that we should review the PCRA decision since it either represents the state courts' last reasoned opinion on this topic or has not been supplemented in a meaningful way by the higher state court. This decision accords with those of seven of our sister circuit courts that consider the "last reasoned

decision" of the state courts in the AEDPA context. *See Pinholster v. Ayers*, 525 F.3d 742 (9th Cir. 2008); *Mark v. Ault*, 498 F.3d 775 (8th Cir. 2007); *Joseph v. Coyle*, 469 F.3d 441 (6th Cir. 2006); *Sweet v. Secretary, Dept. of Corrections*, 467 F.3d 1311 (11th Cir. 2006); *Gunter v. Maloney*, 291 F.3d 74 (1st Cir. 2002); *Bledsue v. Johnson*, 188 F.3d 250 (5th Cir. 1999); *Boyd v. French*, 147 F.3d 319 (4th Cir. 1998). *See also Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991) (establishing presumption, in pre-AEDPA context, that federal courts should look through an unreasoned higher state-court opinion to the highest reasoned opinion).[14]

42 Pa. C.S.A. § 9711(e) identifies grounds for mitigation at the first-degree murder penalty phase. Trial counsel could and should have used evidence of Bond's mental health and background to establish three mitigating factors – two specific factors and the catch-all factor:

> (2) The defendant was under the influence of extreme mental or emotional disturbance.
>
> (3) The capacity of the defendant to appreciate the criminality of his

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[14]In any event, we note that our resolution of this case would not change if we reviewed the Pennsylvania Supreme Court's opinion rather than the PCRA opinion.

> conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> . . .
>
> (8) Any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense.

42 Pa. C.S.A. §§ 9711(e)(2)-(3) & (8).[15] We ask whether, but for counsel's deficient performance, Bond would have presented sufficient evidence in support of these mitigating factors to give a reasonable probability that one juror would have voted for life imprisonment.

Had they sought Bond's school and medical records, and followed up by appropriate consultations with experts such as Crown and Dudley, trial counsel could have presented substantial expert evidence on whether Bond was under the influence of an extreme emotional or mental disturbance at the time he shot Lee. Crown and Dudley testified precisely to this point. They stated that, at the time of the crime, Bond had a substantially impaired capacity to appreciate that his conduct

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[15]We need not address whether counsel correctly attempted to establish Bond's age (25), *see* 42 Pa. C.S.A. § 9711(e)(4), and lack of criminal history prior to his crime spree, *see id.* § 9711(e)(1), as mitigating factors.

was criminal or to conform his conduct to the requirements of law. This would have been strong testimony in support of the first two mitigating factors listed above.

The PCRA court did not find prejudice on this basis, however. It concluded that Gordon's testimony for the Commonwealth had "thoroughly refuted" the testimony of Crown and Dudley. We have reviewed the record closely and discern no such refutation. Gordon did not address large portions of Crown and Dudley's testimony. His testimony challenged Crown's conclusion that Bond suffered from organic brain damage, for example, but Gordon did not contest the testimony of experts and family members indicating that Bond suffered from psychological problems. Gordon also did not discuss Dudley's testimony, including Dudley's PTSD diagnosis. In fact, the Commonwealth introduced no evidence contradicting Dudley's PTSD diagnosis. The PCRA court's conclusion that Gordon had thoroughly refuted Dudley and Crown, rendering any claim based on their testimony "meritless," thus rests on an unreasonable factual determination.

Competent counsel also would have presented evidence of the abuse and neglect Bond suffered during his childhood in support of an argument under the catch-all mitigation factor. As demonstrated at the PCRA hearing, counsel could have obtained testimony from family members that

would have given the jury a very different impression than that left by the other penalty phase testimony. This testimony would not contradict earlier testimony, but rather provide details not uncovered by trial counsel at the penalty phase hearing. This testimony also would receive support from Bond's school records.[16]

The PCRA court rejected the claim that the failure to present this testimony prejudiced Bond. It concluded summarily that Bond had made no showing of prejudice. That court apparently equated the paltry testimony at the penalty phase hearing with the vastly expanded testimony provided by friends and family members at the PCRA hearing. The two sets of testimony brook no comparison. The first left the impression that Bond came from a supportive (if poor) family but went on a crime spree after the type of disappointments many people face in life. The second showed that he had grown up in an extraordinarily dysfunctional environment rife with abuse and neglect. The penalty phase testimony may have suggested some difficulties during Bond's youth, but this does not prevent relief. *Strickland* permits relief where, as here, trial counsel presented some mitigation evidence but could have introduced evidence that

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[16]Tepper also testified that access to the school records would have raised a number of other avenues of inquiry in his mind, including whether Bond suffered from brain injury.

was upgraded dramatically in quality and quantity. The PCRA court's conclusion that Bond had failed to show prejudice, however construed, either reflects an unreasonable determination of fact (in the comparison of the two sets of testimony) or an objectively unreasonable application of controlling law (in denying relief on the basis that Bond already had presented some mitigating evidence).[17]

We thus agree with the District Court that Bond prevails on his penalty phase claim. This conclusion finds support in interpretations of *Strickland* by the Supreme Court and our Court. Counsel performed an inadequate and tardy

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[17]The PCRA court also appears to have departed from the appropriate standard under *Strickland*. It stated that standard at the beginning of its analysis, explaining that "[i]n order to show prejudice the defendant must demonstrate that there is a reasonable possibility that, but for counsel's unprofessional errors, the result of the trial could have been different." PCRA Opinion at 4. The PCRA court repeatedly spoke of Bond's "burden," however, as if he had to prove the truth of his assertions. It wrote the following: "[P]etitioner has failed to carry the burden of showing that, at the time of the offense, he was under the influence of extreme emotional or mental disturbance . . ."; and "[P]etitioner has failed to meet his burden of showing that he suffered from organic brain damage at the time of the offense . . . ." *Id.* at 8. We assume that the PCRA court used this phrasing as shorthand for the appropriate standard under *Strickland* since it did state that standard earlier in its opinion. As discussed above, however, the PCRA court applied *Strickland* in an objectively unreasonable fashion.

investigation into Bond's childhood like the counsel in *Williams*. The defense attorneys in *Wiggins* similarly abandoned their investigation "after having acquired only rudimentary knowledge of [their client's] history from a narrow set of sources." *Wiggins*, 539 U.S. at 524. Bond's trial counsel acted deficiently in ways similar to the counsel in *Rompilla*: both cases involve attorneys who failed to investigate readily available documents. So too did *Outten*, where the trial counsel failed to present evidence of the defendant's family issues, neurological condition, psychological problems, and substance abuse. We discerned prejudice even under the deferential AEDPA standard of review. We also concluded there was prejudice under the AEDPA standard in *Jacobs* and *Jermyn*. The latter case provides a particularly fitting analogy to the current dispute given its overwhelmed counsel who failed to conduct a sufficient investigation.

We do not conclude lightly that the PCRA court decided the question of prejudice in an objectively unreasonable fashion. But, as the cases above demonstrate, such a decision does not lack precedent. The Constitution guarantees that a defendant facing the death penalty receive effective assistance of counsel. Counsel for Bond failed to meet this constitutional minimum. Had they investigated Bond's background and mental health, they would have presented a starkly different picture of Bond to the jury at the penalty phase than the one they actually presented. A reasonable

lawyer who understood Bond's life history would not have proceeded on the theory that he had led a productive life before going on a crime spree as a result of a series of disappointments. Such an attorney instead would have presented evidence to the jury of Bond's abusive and neglectful family life, his low intelligence, and his psychiatric and psychological problems. There is a reasonable probability that this different course, even in the face of competing expert testimony introduced by the Commonwealth, would have resulted in the imposition of a life sentence.[18]

We therefore conclude that the Pennsylvania courts applied *Strickland* unreasonably and made unreasonable determinations of fact in concluding that Bond's counsel did not perform deficiently and that this deficiency did not prejudice *Bond*. *See* 28 U.S.C. § 2254(d)(1)-(2). The Commonwealth must provide Bond with a new sentencing hearing within 180 days or impose a sentence of life imprisonment.

We recognize the burden that this obligation places upon the Commonwealth, especially when it attempted to provide Bond with appropriate representation. That effort does not permit us, however, to force Bond to bear the cost caused by counsel's

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[18]We of course state no view about the proper outcome of a future penalty phase hearing conducted with constitutionally sufficient assistance of counsel.

ineffectiveness in preparing for the sentencing phase of Bond's trial.

IV. Conclusion

For these reasons, we affirm the judgment of the District Court.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

JESSE BOND	:	CIVIL ACTION
	:	
v.	:	
	:	(Death Penalty)
JEFFREY BEARD, Commissioner, Pennsylvania Department of Corrections, et al.	:	NO. 02-cv-08592-JF

MEMORANDUM AND ORDER

Fullam, Sr. J. April 24, 2006

Petitioner Jesse Bond was convicted of first degree murder and sentenced to death in 1993. The conviction and sentence were affirmed on direct appeal. *Commonwealth v. Bond*, 652 A.2d 308 (Pa. 1995). His application for post-conviction relief was denied, and that decision was upheld by the Pennsylvania Supreme Court in *Commonwealth v. Bond*, 819 A.2d 33 (Pa. 2002). Petitioner then timely filed this application for habeas corpus relief.

I. FACTUAL BACKGROUND

The Commonwealth's evidence was to the effect that, over a two-week period in1991,

petitioner and a co-defendant committed three separate robberies of small fast-food establishments. On each occasion, petitioner shot a victim. Two of the victims died, the third was badly wounded. Petitioner was tried separately for the three crimes. In his first trial, petitioner was convicted of second degree murder and sentenced to life imprisonment. In the present case, he was convicted of first degree murder and sentenced to death. In the remaining case, petitioner was convicted of attempted murder and related crimes, and received a lengthy jail sentence. In each of the three cases, petitioner has sought habeas corpus relief in this court. The present case, Civil Action No. 02-cv-08592, deals with the capital conviction. The other two cases (Civil Action Nos. 01-cv-02624 and 02-cv-09132) will be disposed of separately.

II. CLAIMS FOR RELIEF

In a commendably thorough presentation, petitioner's counsel assert a large number of claims for relief, as follows:

1. On the basis of statistical studies, petitioner's death sentence was a product of racial discrimination.

2. The jury which tried this case was tainted by the prosecutor's race-based exercises of peremptory challenges, in violation of *Batson v. Kentucky*, 476 U.S. 79(1986).

3. Because of prosecutorial misconduct, significant exculpatory evidence was not presented at trial.

4. The trial court's jury instructions as to the elements of the offense, and reasonable doubt, violated petitioner's due process rights.

5. Petitioner's statement to the police was obtained in violation of his Sixth Amendment right to counsel.

6. Petitioner's rights under *Bruton v. United States*, 391 U.S. 123, 126-131 (1968), were violated because his trial was not severed from that of his co-defendant, and the co-defendant's unredacted confession (naming petitioner as the shooter) was disclosed to the jury.

7. Petitioner was deprived of the effective assistance of counsel at the penalty phase of the trial, contrary to the requirements of *Strickland v. Washington*, 466 U.S. 668 (1984).

I shall address these claims in substantially the same order as listed above.

III. SCOPE OF REVIEW

As set forth in the AEDPA, 28 U.S.C. § 2254(d):

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to a judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Under the "contrary to" rubric, it must appear that the state court's decision is squarely contrary to a decision of the Supreme Court of the United States. *Williams v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Under the "unreasonable application" rubric, it is not enough that the federal court disagrees with the state court decision; it must appear that the state court decision was so clearly in error that most reasonable jurists would regard it as erroneous.

Lockyer v. Andrade, 538 U.S. 63, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003).

IV. ISSUES OF RACIAL DISCRIMINATION

Petitioner is African-American. The victim in this case was of Asian ancestry. Petitioner asserts that Pennsylvania's laws concerning the imposition of the death penalty are unconstitutionally applied, particularly in Philadelphia, on the basis of the race of defendants and the race of victims, and that such racial disparity undermines the validity of petitioner's sentence. In a separate but related argument, petitioner asserts that the selection of the jury in his case was carried out in a racially discriminatory manner.

A. Discriminatory Application of the Death Penalty

Petitioner's counsel have assembled an impressive group of statistical studies which demonstrate that, throughout Pennsylvania and particularly in Philadelphia, death sentences are much more likely to be imposed if the defendant is black and the victim is white; that defendants who are black are much more likely to receive the death penalty than defendants who are white (regardless of the race of the victim); and that the death penalty is much less likely to be imposed where the victim was black than where the victim was white. Although the jury-selection issues were presented

to the state courts and have clearly been exhausted, the statistical argument regarding the death penalty itself has not been ruled upon by the Pennsylvania Supreme Court in this case. There is room for disagreement as to whether this court may now address that claim.

In the state court, petitioner asserted that the statistical studies upon which the claim is based were first published while his PCRA appeal was pending. He sought leave to amend his appeal to include that claim, but the Pennsylvania Supreme Court declined to permit the amendment (ruling that petitioner would need to file another PCRA petition in the lower court), and refused to consider the issue. So far as the record discloses, petitioner did not file any further PCRA applications. Petitioner's counsel nevertheless argue that the Pennsylvania Supreme Court was given the opportunity to consider the issue, but declined to do so, hence exhaustion has been satisfied.

I am inclined to agree with respondent's argument that this court is precluded from now considering the issue. But I find it unnecessary to resolve that procedural issue definitively, since I am not persuaded by petitioner's statistical argument.

I accept as correct all of the statistical information set forth in petitioner's brief and at the hearing in this matter. Petitioner's counsel make a

strong showing that the criminal justice system in Pennsylvania is not immune from the racial flaws which persist in our society. But the statistics do not prove that, in any particular case, racial prejudice infected the verdict.

These statistical studies may provide support for an argument that the death penalty should be abolished, but that is a matter for the legislature, not the judiciary. So long as the law authorizes the death penalty in appropriate cases, the proper way to address the evils which may be inferrable from these statistical studies is to insure that, in every case, the outcome is not tainted by racial discrimination.

B. Batson Issues; Jury Selection

Petitioner's trial took place in February 1993. Five years earlier, in 1988,a deputy district attorney named Jack McMahon conducted a training session for assistant D.A.s, including a videotaped presentation advising about the proper way to select a jury. The existence of this tape was not publicly disclosed until after petitioner's trial, when Mr. McMahon became a candidate for district attorney in 1997. The videotaped presentation can reasonably be interpreted as advising the listener to take race into account in the course of jury selection, and as providing suggestions as to how to avoid being successfully accused of violating the tenets of *Batson v. Kentucky*, ___ U.S. ___ (1986).

Among other things, Mr. McMahon depicted the ideal jury as composed of four blacks and eight whites.

Mr. McMahon was not the prosecutor in petitioner's trial; the Commonwealth was represented by John Doyle, Esquire. Mr. Doyle had, however, been an assistant district attorney throughout the entire period and presumably could have been exposed to the taped lecture at one time or another. He was not present when the actual lecture was first presented, but the resulting "training tape" was on file in the library of the District Attorney's Offices, although not in the same building where Mr. Doyle was primarily employed.

Mr. Doyle credibly testified in this court that he had never viewed the McMahon tape, and had never discussed jury selection issues with Mr. McMahon. At the hearing in this court, petitioner's counsel presented additional evidence of other training sessions conducted by other assistant district attorneys on the subject of jury-selection. On behalf of petitioner, it is argued that the evidence as a whole demonstrates an official position on behalf of the District Attorney's Office as to the proper way to select a jury in a criminal case. I agree that this is a reasonable inference, but I do not conclude that it was the policy of the District Attorney's Office to discriminate on racial grounds in the process of selecting juries.

After all, it would be impossible to discuss the implications of the *Batson* decision, and the correct way to select juries in the wake of that decision, without mentioning the subject of race. The evidence makes clear that assistant district attorneys were urged to try to obtain juries which would be willing to convict, and to avoid jurors believed to be too favorable to the defense side of the case. It was important for assistant district attorneys to adhere to *Batson*'s requirements, so as not to jeopardize convictions. It was equally important for assistant district attorneys to avoid being falsely accused of *Batson* error. The evidence shows that, at times, it was suggested to assistant district attorneys that, if they intended to challenge a prospective juror who was black, they should make sure that valid reasons were noted, in the event of a *Batson* challenge by the defense. While such instructions could conceivably be viewed as coaching assistant district attorneys to conceal violations of *Batson*, I believe the more reasonable interpretation is that all concerned were attempting to guard against false accusations of racial discrimination. In sum, I conclude that the "official policy" evidence is of minimal assistance to petitioner's contention, and that the issue must be resolved on the basis of what actually occurred at petitioner's trial.

It is clear that *Batson* issues were on the minds of the attorneys and the trial judge in the course of jury selection. The overall statistics are

noteworthy: Mr. Doyle used 11 of 15 (73.3%) of his peremptory challenges against African-Americans; accepted 4 of 15 African-Americans (26.6%); and accepted 20 of 24 (83.3%) Caucasians or other non-African-Americans.

Midway through the jury selection process, after Mr. Doyle had exercised challenges to excuse three white jurors in a row, Mr. Doyle accused the defense of systematically excluding white jurors. The court responded:

> "Quite the contrary. I'm concerned about the Commonwealth's actions here, not about the defense. The defense has had the opportunity to strike 13 whites. Of the 13 opportunities, they have accepted 6 and struck 7. It makes no sense for you to even raise this issue.
>
> With respect to your striking of blacks, you have had the opportunity to strike 5, and of that, you have preempted 4, which is a much higher percentage.
>
> Beyond that, there seems to be a difference in pattern before you made this motion. Previously, you were accepting many white jurors and suddenly you struck 3 in a row, and it

> seems to me it may be leading up to this kind of a statement.
>
> I reject your position. I don't want to hear any more about it."

When petitioner's counsel thereafter objected to some of the peremptory challenges exercised by the prosecutor, the court required the prosecutor to explain his actions on several occasions. In each instance, the trial judge found the explanation satisfactory (Although, on one occasion, he rejected the prosecutor's original excuse, and accepted a further explanation by the prosecutor.). These findings were upheld on appeal. The question for this court is whether the state court's findings were so plainly unreasonable and unsupportable as to absolve this court of its obligation to accord the findings great deference.

For several reasons, I believe the state court findings were erroneous. For example, Mr. Doyle's final challenge was to an African-American lady named Joyce Hinton. Her father was a retired Philadelphia police officer, and she stated she would be able to impose a sentence of death in an appropriate case. Mr. Doyle then asked her if she was sure about that, and the juror responded, "Are you asking me will I have a problem?" The prosecutor responded, "I'm asking you." The defense counsel interposed an objection, which was sustained in part. The judge then asked Ms. Hinton

whether she could consider both alternatives and in a proper circumstance find the death penalty, and she responded, "That's what I said, yes." The prosecutor was required to explain his challenge of this juror and stated that she "clearly hesitated" about the death penalty. The judge then stated, "She didn't hesitate, in this court's opinion," and noted that it was not appropriate for the prosecutor to ask "Are you sure?" with respect to the death penalty. Mr. Doyle then stated that he did not strike Ms. Hinton because she hesitated on the death penalty, but because he perceived that "she resented my asking, are you sure. She is the first witness of this entire two days who took offense when I asked the question." The trial judge accepted this as a race-neutral explanation.

In addition to this episode, it should be noted that, throughout the jury selection process, Mr. Doyle asked many more questions of black potential jurors than of whites, including, specifically, whether they were "sure" about the death penalty.

Although I harbor significant misgivings on the subject, I conclude that it would be inappropriate for me to substitute my analysis of the evidence for that of the state courts. The trial judge was present, was familiar with counsel and their proclivities, and was plainly making efforts to avoid *Batson* problems. Given the restrictions imposed by the AEDPA upon federal courts' review of state

court findings, I conclude that habeas relief on *Batson* issues is precluded.

V. REMAINING ISSUES AFFECTING THE GUILT PHASE

A. Bruton Issues

Petitioner and his co-defendant, Wheeler, were tried together. Each had separately confessed to the crime and named the other as a participant. Wheeler's confession named petitioner as the person who did the shooting. Before trial, it was apparently agreed between the prosecutor and petitioner's counsel that, assuming Wheeler did not testify at trial so that he could be cross-examined by petitioner, the Wheeler statement would be redacted by replacing petitioner's name with "another guy" wherever it appeared.

Unfortunately, in his opening address to the jury, the prosecutor made frequent references to Wheeler's confession, and instead of using the agreed-upon redaction, substituted the words "the killer" for petitioner's name. Petitioner's counsel did not object at the time, and the trial judge appears to have considered that counsel had agreed upon this version of the redaction. Be that as it may, toward the end of the prosecutor's opening address, while reading Wheeler's statement to the jury, he "inadvertently" omitted the redaction, and

actually used petitioner's name in place of "the killer."

Both petitioner and his co-defendant moved for a mistrial, and requested that a new jury be impaneled. After lengthy discussion, petitioner's counsel for the first time suggested that redaction was inappropriate in the first place, and that the petitioner's trial should have been severed from that of Mr. Wheeler. Although obviously troubled by the problem, the trial judge eventually decided that it would suffice if he simply told the jury that statements in opening addresses did not constitute evidence, and that they should disregard the prosecutor's statements about petitioner.

Post-trial, both the trial court and the Supreme Court recognized that a *Bruton* error had indeed occurred, but both ruled that, in view of the corrective action by the trial judge, and particularly in view of the strength of the other evidence presented by the government, the *Bruton* error was harmless.

Here again, if I were deciding the matter in the first instance, I would have great difficulty characterizing the error as harmless.

It also bears mentioning that, in *Harvey v. Klem*, 2005 WL701713 (E.D. Pa. Mar. 28, 2005), my colleague Judge Yohn was confronted with a similar "inadvertent" disclosure by another

Philadelphia prosecutor. A cynic might infer that, just as Mr. McMahon coached prosecutors to evade the requirements of *Batson*, someone may have been coaching Philadelphia prosecutors on how to evade *Bruton* as well.

Notwithstanding my reservations on this issue, I conclude that jurists of reason could conclude that the error was indeed harmless in petitioner's case, and that the state court findings in this case must be accorded deference.

B. Failure to Present Exculpatory Evidence

A witness named Beulah Sheppard was interviewed by police before trial, and gave a statement which implicated petitioner as a perpetrator of the crime. When called as a witness at trial, however, Ms. Sheppard recanted, and stated that she only gave the statement to the police in the hope of obtaining a reward. The prosecutor was then permitted to impeach her on the basis of her previous statement, and to argue to the jury that her previous statement was true, and her trial testimony false. Petitioner now seems to be arguing that it was improper for the prosecutor to contend that the previous statement was true, and that petitioner was thereby deprived of the benefit of Ms. Sheppard's trial testimony. I reject that contention, and conclude that no error occurred.

Petitioner contends that two other witnesses would have presented exculpatory testimony if called at trial, and that his trial counsel was constitutionally ineffective for failing to interview these witnesses and present their testimony at trial. The factual basis for this argument is totally lacking. Although there is evidence suggesting that these witnesses were in the vicinity of the crime, and offered descriptions of the perpetrators which, at least arguably, did not resemble petitioner, there is no evidence as to whether or not petitioner's trial counsel interviewed these individuals. Neither in the PCRA, nor in this court, was trial counsel (Mr. Bruno) questioned about this issue. Accordingly, even assuming that this court is not precluded from addressing the matter, *see Jacobs v. Horn*, 395 F.3d 92 (3d Cir. 2005), no relief can be predicated upon this issue.

A further argument is presented to the effect that petitioner has not been permitted to have the benefit of a post-trial recantation of the confession previously given by his co-defendant, M. Wheeler. Mr. Wheeler did not testify at trial, but his confession as to his own involvement was presented to the jury. He was sentenced to life imprisonment. Six months later, he executed an affidavit recanting his confession. He stated that his confession had been coerced and had been induced by promises of lenient treatment. He stated that he had no knowledge of the crime, and therefore his

statement that petitioner was the shooter was baseless.

The recantation affidavit was presented to the PCRA court, but Mr. Wheeler was not called as a witness. The court ruled that the recantation was not worthy of belief, and did not constitute a reason for granting a new trial. I, likewise, fail to see the relevance of the recantation to this case: Mr. Wheeler did not testify at trial, and the confession constituted evidence against Mr. Wheeler only. The recantation, if accepted at face value, undermines the conviction of Mr. Wheeler, but does not exonerate the petitioner.

C. Jury Instructions

Petitioner argues that the charge to the jury was incorrect and inadequate, because it did not properly instruct the jury that the prosecution had the burden of proving each and every element of the crime beyond a reasonable doubt, and because the instruction as to accomplice liability and the liability of co-conspirators was incomplete and inaccurate. Since no objections were expressed at trial, these claims charge trial counsel with inadequacy for failing to object, and failing to raise the issue on direct appeal.

Actually, this claim was not even raised in the PCRA court, but first saw the light of day during the PCRA appeal. It has not been exhausted,

and has been waived. Moreover, while I agree that the court's charge to the jury was not perfect, I am satisfied that, viewed in its entirety, it was constitutionally sufficient.

D. Admissibility of Petitioner's Confession

I am satisfied that the state courts have properly rejected petitioner's claims with respect to the voluntariness and admissibility of his confession, and see no need to unduly lengthen this opinion by further discussing the issue.

For all of the reasons discussed above, petitioner's challenge to his conviction must be rejected.

VI. THE PENALTY PHASE

Petitioner is on firmer ground in challenging the constitutional adequacy of his trial counsels' performance at the penalty phase of the trial. Initially, James Bruno, Esquire was appointed by the court to represent the petitioner in all of his cases. At that time, the Defender Association did not handle capital cases, but it had been decided that the Defender Association would accept such appointments in the near future. Accordingly, it became necessary for lawyers in the Defender Association office to gain experience with capital trials. In furtherance of that goal, an attorney named Dean Owens, Esquire was appointed as

co-counsel with Mr. Bruno. Mr. Owens was present during the guilt phase of the trial, but did not participate in conducting the defense. Mr. Owens was not qualified to handle a capital case, in accordance with Philadelphia Criminal Rule 406.

After the jury found petitioner guilty of first degree murder, it was agreed between Mr. Bruno and Mr. Owens that the latter would take the lead during the penalty phase. Although petitioner argues that this was done without petitioner's consent, and served to deprive him of counsel of his choice, I conclude that the real issue is whether, in its totality, petitioner's representation by counsel at the penalty phase complied with constitutional requirements. I have no hesitation in concluding that it did not.

Petitioner had had a particularly deplorable upbringing. He was abandoned by his father at a very early age, was frequently absent from school because he had no shoes or warm clothing to wear, was physically beaten by siblings at the behest of his mother, who was an alcoholic and largely bereft of maternal instincts. According to his school records, he was, at best, borderline retarded, and suffered from learning disabilities and other psychological problems. As a teenager, he was struck in the head with a metal jack-handle, and suffered severe injuries. He was hospitalized for nine days, and at least two expert witnesses have now opined

that he suffered permanent brain damage as a result.

It is very clear that, if counsel had fulfilled their obligation of conducting a reasonable investigation, *see Rompilla v. Beard*, 125 S. Ct. 2456 (2005), very significant evidence could have been presented to the jury in mitigation of the penalty.

Mr. Bruno did interview some of the family members before any of the trials, and also arranged to have petitioner interviewed by a psychologist, Dr. Tepper. Dr. Tepper interviewed petitioner for a period of about an hour and a half, and gave Mr. Bruno a written report of his findings, which were rather non-committal and non-specific. Apparently, Mr. Bruno sought Dr. Tepper's advice primarily on the issue of whether petitioner had the mental capacity to understand his Miranda warnings, and to validly waive his right to counsel before giving his confession.

Mr. Bruno had not obtained any of petitioner's school records, or the hospital records concerning his head injury, and Dr. Tepper did not consider any of the information disclosed by those records.

Mr. Bruno and Mr. Owens did not actually begin to prepare for the penalty phase in this case until after the jury had found petitioner guilty of first degree murder. At that point, they notified

petitioner's mother and arranged to have various family members available to testify and, apparently in consultation with other lawyers from the Defender Association, decided what their trial strategy would be. It was agreed that Mr. Owens would take the lead in presenting the case to the jury, because he was the son of a prison official, and had more knowledge of prison conditions than Mr. Bruno. It was thought that Mr. Owens might be able to persuade the jury that, on the one hand, prison life itself provided severe punishment for crime, and, on the other hand, that many prisoners could be successfully reformed and rehabilitated.

At the start of the penalty-phase trial, petitioner's counsel proceeded on the assumption that both lawyers would be able to make an opening presentation to the jury, but the trial judge (understandably enough) ruled that only one lawyer could make an opening statement, and that only one lawyer could examine each witness.

Mr. Owens then proceeded to present the testimony of petitioner's mother, sister, and other family members. The apparent intent of counsel was to establish that petitioner had had a difficult childhood, with few advantages; that he was fun-loving and good-humored, that he had been close to his"stepfather" who had recently died, and had been devastated by that loss; and that he was extremely disappointed because he had narrowly failed to pass the exam for his GED.

Unfortunately, the trial record makes clear that Mr. Owens had not given much thought to the specific questions he would ask each witness; more importantly, it is clear that the witnesses did not know what questions to expect, and were frequently surprised and caught off guard by the questions that were asked. Mr. Owens did establish, with some difficulty, that, on occasion, petitioner had been known to help out older people by running errands, without accepting compensation. No evidence contained in, or derived from, petitioner's school records or medical records was presented.

At the PCRA hearing, petitioner's new counsel presented the testimony of two experts, Dr. Barry Crown and Dr. Richard Dudley, who testified that the petitioner has organic brain damage which substantially impaired his ability to conform his conduct to the requirements of law, and that he suffered from Post-Traumatic Stress Syndrome. The PCRA court found that petitioner's trial counsel satisfied the *Strickland* standard because the testimony of petitioner's experts was "thoroughly refuted by Dr. John Gordon, a neuropsychologist, who testified for the Commonwealth at the July 16, 1997 PCRA hearing." This factual finding is, in my view, not supported by the record. Although Dr. Gordon disagreed with some of the conclusions expressed by the other two experts, he simply did not address all of their opinions, and certainly did not "thoroughly refute" their testimony. Moreover, and more importantly, I believe the state courts

have addressed the wrong issue. The issue is whether petitioner's counsel did or did not conduct a reasonably adequate investigation (clearly, they did not), and whether, if they had, they would have unearthed evidence which might very well have persuaded the jury that there were mitigating circumstances of sufficient weight to justify a sentence of life imprisonment.

It must be remembered that petitioner's counsel at trial suggested only two possible mitigating factors – petitioner's young age (but he was 25) and his alleged lack of a previous history of criminal violence (but, by stipulation, he had just committed felony-murder a few days before the killing involved in this case). Petitioner's counsel cannot be held responsible for the weakness of the two mitigating factors which were tendered to the jury, but they were patently ineffective in a constitutional sense for failing to investigate and to uncover readily available evidence in support of additional specific mitigating factors.

The failure to conduct a reasonable investigation in preparation for the penalty-phase trial would, without more, warrant vacating the death sentence in this case. But there is more: petitioner's counsel seemed to be operating on the assumption that sympathy for the defendant's plight could be accepted by the jury as a reason for choosing a life sentence. Indeed, Mr. Owens submitted a point for charge to that effect, and argued

to the jury in that vein. Under Pennsylvania law, however, sympathy is not to be considered unless it arises from the evidence of other, authorized, mitigating factors. Under the governing statute, the jury was permitted to consider two specific mitigating factors (age of the defendant, and absence of previous crimes of violence) and a "catch-all" factor based upon evidence concerning the circumstances of the crime and the characteristics of the defendant. Thus, if the jury was paying attention to the judge's charge in this case, the only valid mitigating factor presented by defendant's counsel which the jury could properly consider, was the age of the defendant. And, as noted above, he had attained the age of 25.

In addition to the constitutional ineffectiveness of petitioner's counsel at the penalty phase, the jury arguments advanced by the prosecutor are a cause for concern. The prosecutor's opening address, and closing argument at the guilt-phase trial were decidedly aggressive, replete with expressions of the prosecutor's own opinions about the case, etc. The closing argument at the penalty phase went even further, and seems designed to create a lynch-mob mentality on the part of the jury. At the very least, it represents an unacceptable appeal to class prejudice, an "us against them" approach to the case. It is to be hoped that, if there is to be a retrial of the penalty phase, these errors will be avoided.

VII. CONCLUSION

For the reasons set forth above, the petition of Jesse Bond for a writ of habeas corpus is denied with respect to the petitioner's conviction of first degree murder, and is granted with respect to petitioner's sentence. The sentence will be vacated, and the case remanded to the state courts for further proceedings.

An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

JESSE BOND	:	CIVIL ACTION
	:	
v.	:	
	:	(Death Penalty)
JEFFREY BEARD, Commissioner, Pennsylvania Department of Corrections, et al.	:	NO. 02-cv-08592-JF

ORDER

AND NOW, this 24th day of April 2006, upon consideration of the Petition of Jesse Bond for a Writ of Habeas Corpus, and the response thereto, IT IS ORDERED:

1. Insofar as the Petition seeks reversal of the judgment of conviction of first degree murder, the Petition is DENIED, but a certificate of appealability is ISSUED.

2. With respect to the penalty of death, the Petition is GRANTED. The petitioner's sentence is VACATED, and the case REMANDED to the state courts for further proceedings. Unless the petitioner is afforded a new sentencing hearing within 120 days, he shall be sentenced to life imprisonment in this case.

3. There is probable cause to appeal the denial of relief with respect to the conviction.

BY THE COURT:

/s/ John P. Fullam
John P. Fullam, Sr. J.

(EXCERPT)

[J-137-1999]
THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 212 Capital Appeal Docket
	:	
Appellee	:	Appeal from the Order of the Court of Common Pleas of Philadelphia County
v.	:	entered on December 10, 1997, at Nos. 1778, 1783, 1785, 1787, 1789, January Term 1992.
JESSE BOND,	:	
	:	SUBMITTED:
Appellant	:	July 15, 1999
	:	

OPINION OF THE COURT

MR. JUSTICE CASTILLE **DECIDED: August 23, 2002**

This is an appeal from the denial of appellant's petition for relief under the Post Conviction Relief Act (PCRA), 42 Pa.C.S. § 9541 *et seq.* For the

reasons set forth herein, we affirm the order of the PCRA court.

In February of 1993, a jury found appellant guilty of first degree murder, robbery, possessing an instrument of crime and conspiracy, and sentenced him to death. On direct appeal, this Court summarized the underlying facts as follows:

> At approximately 6:39 p.m., on the evening of October 31, 1991 appellant and his codefendant, Aaron Wheeler, entered the Stop and Go Deli at 2200 North Broad Street in Philadelphia. While the codefendant acted as a lookout, appellant pointed a gun at a store employee, Yang-Jin Kim, and ordered him to open the cash register and give appellant the money. Mr. Kim called to the store manager, Jai Ho Lee, who was behind the counter. Mr. Kim went to the register and hit the "no-sale" button in order to open the drawer. Mr. Lee closed the drawer and locked the register and then threw the key on the floor. [Appellant], who was standing about four feet in front of Mr. Lee when Mr. Lee threw the key on the floor, responded by shooting Mr. Lee in the upper left side of his chest. The bullet entered the left lung and perforated the aorta, the main blood vessel

> to the heart, and then exited the body. Mr. Lee was pronounced dead fifteen minutes later having bled to death as a result of the gunshot. Appellant and his codefendant fled from the store after the shot was fired.

Commonwealth v. Bond, 652 A.2d 308, 310 (Pa. 1995) (footnote omitted). Appellant was represented at trial by appointed counsel, James S. Bruno, Esquire, and co-counsel, Dean Owens, Esquire, of the Defender Association of Philadelphia. On direct appeal to this Court, Attorney Bruno represented appellant. On January 12, 1995, this Court affirmed appellant's conviction and sentence of death. *Id.*

On June 6, 1995, appellant filed the instant PCRA petition. The PCRA court, per the Honorable David N. Savitt, appointed new counsel, Ramy Djerassi, Esquire, to represent appellant, and new counsel then filed an amended petition and supplemental petitions. The court held an extensive evidentiary hearing over the course of several days where appellant was represented by both Attorney Djerassi and present PCRA appeal lead counsel, Michael Wiseman, Esquire, who at the time of the hearings was apparently affiliated with the Defender Association of Philadelphia and is now affiliated with the Capital Habeas Corpus Unit of that organization. Judge Savitt ultimately denied

PCRA relief on December 10, 1997, and appellant appealed to this Court.

After the notice of appeal was filed, Attorney Djerassi motioned to withdraw from the case, noting, *inter alia*, that Robert Brett Dunham, Esquire, of the Center for Legal Education, Advocacy and Defense Assistance (CLEADA), had entered an appearance. Attorney Dunham, like Attorney Wiseman, is now employed by the Capital Habeas Unit of the Defender Association. This Court granted the motion to withdraw representation and CLEADA, per Attorney Dunham, filed the Initial Brief of Appellant. Thereafter, the Commonwealth, responding to a *pro se* filing by appellant, filed a petition in this Court seeking a remand for a colloquy to determine whether appellant desired to proceed *pro se*. On August 27, 1999, this Court remanded the matter for a limited hearing to determine: (1) whether appellant wished to terminate his appeal; (2) whether he wished to proceed *pro se* or to be represented by current counsel; and (3) whether he wished to proceed on the basis of the brief filed by counsel. After the hearing, Judge Savitt found that appellant did not wish to terminate his appeal, that he wanted to be represented by Attorney Wiseman, and that he wanted to proceed on the basis of the brief previously filed. Attorney Wiseman has since filed a reply brief on appellant's behalf. Accordingly, the matter is ripe for review.

* * * *

Appellant claims that trial counsel were ineffective in their investigation and presentation of mitigation evidence at the penalty phase. During the penalty phase, the jury found three aggravating circumstances: that appellant committed the murder during the perpetration of a felony, 42 Pa.C.S. § 9711(d)(6); that appellant had been convicted of another murder, *id.* § 9711(d)(11); and that appellant had a significant history of other violent felonies. *Id.* § 9711(d)(9).[5] Appellant, meanwhile, produced evidence in support of the "catch-all" mitigating circumstance concerning appellant's character or background. *Id.* § 9711 (e)(8). The jury found no mitigating circumstances.

Appellant now faults his trial counsel for failing to introduce evidence that he was abused and neglected as a child and that he allegedly suffers from organic brain damage. Although appellant poses this claim under both the federal Constitution (the Sixth and Fourteenth Amendments) and the Pennsylvania Constitution (Article I, Section 9), he does not argue that the test for

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[5]The latter two aggravating circumstances arose from an incident that occurred ten days before the killing in this case. That matter came to trial two months before this case, resulted in convictions of second degree murder, robbery, and criminal conspiracy, and appellant was sentenced to life imprisonment.

ineffectiveness is any different under the two charters. Instead, he correctly notes that trial counsel's performance is governed by the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). This Court has long recognized that the *Strickland* test is the same test for ineffectiveness as prevails under the Pennsylvania Constitution. *Commonwealth v. Williams*, 782 A.2d 517, 524 (Pa. 2001); *Commonwealth v. (Charles) Pierce*, 527 A.2d 973 (Pa. 1987). We have recently restated the familiar test for counsel ineffectiveness as follows:

> Appellant must prove: (1) that the underlying claim is of arguable merit; (2) that counsel's performance lacked a reasonable basis; and (3) that the ineffectiveness of counsel caused him prejudice. *Commonwealth v. Miller*, 560 Pa. 500, 746 A.2d 592, 598 (2000). Prejudice in the context of ineffective assistance of counsel means demonstrating that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different. *Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326, 332 (1999). This standard is the same in the PCRA context as when claims of ineffective assistance of counsel are raised on direct review. *Id.*

(Michael) Pierce, 786 A.2d at 213. *See also Abdul-Salaam*, 2001 WL 1663976 at *2 (same).

To demonstrate the alleged history of childhood abuse that appellant argues might have changed the penalty phase outcome, appellant presented testimony before the PCRA court from his mother, four siblings, and another individual who lived in appellant's home for nine years beginning when appellant was ten years old. These witnesses testified to the poverty in which appellant was raised as well as the abusive atmosphere prevailing in his home and his mother's poor parenting skills. Appellant argues that his trial counsel were ineffective because they did not present this evidence, which appellant claims would have supported a jury finding of the catch-all mitigating circumstance. *See* 42 Pa.C.S. § 9711(e)(8). To support his claim regarding his alleged organic brain damage, appellant presented expert witnesses and pointed to anecdotes in his past that he believed corroborated that appellant had some form of mental impairment. Appellant argues that this evidence would have supported a finding of the catch-all mitigating circumstance and was also relevant evidence "of an extreme mental and emotional disturbance." *See id.* § 9711(e)(2).

In his reply brief, appellant argues that the United States Supreme Court's Sixth Amendment decision in *Williams v. Taylor*, 529 U.S. 362 (2000), which was decided after he filed his initial brief,

"directly governs the outcome of this case" with respect to this particular claim. The *Williams* argument is overstated. *Williams* does not alter the legal standard governing appellant's ineffectiveness claim; as the U.S. Supreme Court emphasized in *Williams*, it is still the *Strickland* test that governs the evaluation of counsel's penalty-phase preparation and performance. Indeed, if *Williams* had set forth a new or modified *Strickland* standard, appellant would not be entitled to its benefit since counsel in this case were acting long before *Williams* was decided. Appellant himself implicitly recognizes this fact, as he states elsewhere that *Williams* "did not break any new ground in describing the obligations of counsel in a capital case." Reply Brief of Appellant, 3. Accordingly, *Williams* is relevant to our inquiry in the limited sense that it represents an example of the U.S. Supreme Court's application of its settled *Strickland* test in factual circumstances which, according to appellant, are materially indistinguishable from the facts presented here.

Williams involved a Virginia state murder conviction. The Virginia trial court judge, sitting on collateral review, applied the *Strickland* standard and found that trial counsel were ineffective for failing to discover and present significant mitigation evidence, including evidence memorialized in "documents prepared in connection with Williams' commitment when he was 11 years old that dramatically described mistreatment, abuse, and

neglect during his early childhood, as well as testimony that he was 'borderline mentally retarded,' had suffered repeated head injuries, and might have mental impairments organic in origin." 529 U.S. at 370. The Virginia Supreme Court rejected the trial judge's recommendation that a new sentencing hearing be granted. In so doing, that court did not pass upon the question of counsel ineffectiveness, which the court assumed, but instead concluded that Williams had failed to prove prejudice under *Strickland* in light of the modification of the *Strickland* prejudice test that it gleaned from the U.S. Supreme Court's later decision in *Lockhart v. Fretwell*, 506 U.S. 364 (1993).

After Williams sought federal habeas corpus review of his ineffectiveness claim, a federal district court recommended granting relief, as it found that the Virginia Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law" under 28 U.S.C. § 2254(d)(1). The quoted portion of § 2254(d) sets forth the new federal habeas standard of review of state convictions which was enacted under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Applying AEDPA, the Fourth Circuit reversed the district court, concluding that the Virginia Supreme Court's ruling on the question of ineffectiveness prejudice was not an unreasonable application of *Strickland* or *Lockhart*. *See* 529 U.S. at 371-74.

The U.S. Supreme Court granted certiorari and itself reversed, as it agreed with the district court that the Virginia Supreme Court's ruling was contrary to, or an unreasonable application of, *Strickland*. *Williams* is particularly significant in federal habeas corpus jurisprudence because it provided the Court with its first opportunity to address the proper interpretation of the AEDPA standard of review; the Court split 5-4 on that federal question, the majority view being authored by Justice O'Connor. On the question relevant to our inquiry, *i.e.*, the application of *Strickland*, the vote was 6-3, with the majority view being authored by Justice Stevens and amplified by Justice O'Connor's concurring opinion.

The *Williams* Court held that the Virginia Supreme Court erred in holding that *Lockhart* modified or in some way supplanted the test for prejudice articulated in *Strickland*.[6] The Court then proceeded to analyze the *Strickland* claim in

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[6]The modification in *Strickland* posed by an application of *Lockhart* would "require a separate inquiry into fundamental fairness even when [the defendant] is able to show that his lawyer was ineffective and that his ineffectiveness probably affected the outcome of the proceeding." 529 U.S. at 393. For our purposes, of course, the modification *Lockhart* would have worked in the *Strickland* prejudice test is academic. *Williams* reaffirms that it is *Strickland* that governs the type of claim we face here, so it is *Strickland* that we must apply.

its own right. In this regard, the Court noted that the Virginia trial judge had analyzed Williams' claim under the proper federal standard set forth in *Strickland*, "and correctly applied both components of that standard to Williams' ineffectiveness claim." In upholding the state trial judge's determination, the Supreme Court summarized the relevant record as follows:

> The record establishes that counsel did not begin to prepare for [the penalty] phase of the proceeding until a week before the trial. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released

> from prison, had been returned to his parents' custody.
>
> Counsel failed to introduce available evidence that Williams was "borderline mentally retarded" and did not advance beyond sixth grade in school. They failed to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates "least likely to act in a violent, dangerous or provocative way." Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams "seemed to thrive in a more regimented and structured environment," and that Williams was proud of the carpentry degree he earned while in prison.

Id. at 395-96 (footnote and citations to record omitted).

In a footnote to the above passage, the Court described in detail Williams' "nightmarish

childhood" as it was memorialized in his juvenile records:

> Juvenile records contained the following description of his home:
>
> "The home was a complete wreck. . . . There were several places on the floor where someone had had a bowel movement. Urine was standing in several places in the bedrooms. There were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash. . . . The children were all dirty and none of them had on underpants. [The parents] were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. . . . The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey."

Id. at 395 n.19 (citations to record omitted).

The Court found that, although not all of the additional evidence was favorable to Williams – for example, the juvenile records also revealed three commitments to the juvenile system for separate offenses between the ages of eleven and fifteen – "the failure to introduce the comparatively

voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession." *Id.* at 396. Moreover, the additional evidence demonstrated that counsel failed to conduct a reasonable investigation of Williams' background. Turning to the question of *Strickland* prejudice, the Court agreed with the assessment of the Virginia trial judge – "the very judge who presided at Williams' trial and who once determined [as required under Virginia law] that the death penalty was 'just' and 'appropriate'" – that there was a reasonable probability that the result of the sentencing phase might have been different if the jury had heard this evidence. *Id.* at 396-97.

Contrary to appellant's argument, this case is distinguishable from *Williams* with respect to the nature and quality of the evidence counsel are accused of failing to discover and present, with respect to the reasonableness of the investigative course undertaken by counsel, and with respect to *Strickland* prejudice. This matter is not a case where there were "extensive" independent records, available to counsel upon reasonable investigation but ignored based upon a misapprehension of state law, which vividly documented and memorialized a "nightmarish childhood" involving alcohol intoxication, beatings and neglect so extreme as to result in the incarceration of appellant's parents and his commitment to the custody of a social agency. Nor does this case involve foregone independent

evidence of borderline mental retardation. This case also does not involve a trial judge who was convinced that the unpresented evidence raised a reasonable probability that the result might have been different. The PCRA judge here – the very judge who presided at trial – reached the opposite conclusion after a thorough PCRA evidentiary hearing in this case.

We find no error in the PCRA court's denial of relief. The record here reveals that appellant's lead trial counsel spoke on a number of occasions with appellant and his family, but that neither appellant nor his family members ever mentioned to counsel a history of abuse and family dysfunction. N.T. 4/15/97 at 62-63, 82-83. Rather, appellant and his family related to counsel circumstances that suggested that appellant's conduct in this case was aberrational and of recent vintage. This evidence, which counsel presented and argued at the penalty hearing, revealed that appellant had never had problems prior to the time that he committed the instant murder and two additional crimes in the same two week period, that he had reacted poorly to the death of his stepfather, which occurred near the time of the crimes, and that he had suffered an additional major disappointment when he was not accepted into the U.S. Army because he failed his G.E.D. test by one point. Thus, unlike Williams' counsel, trial counsel here had no "smoking gun" records or other indication that there was an avenue of investigation available

to them which offered a prospect of success that was qualitatively better than the course counsel pursued.

Furthermore, lead trial counsel testified that, approximately three months before the trial in this case, he retained Dr. Allan Tepper, a forensic psychologist who is also a criminal defense attorney and who had testified as an expert on numerous occasions in criminal trials in Philadelphia County on behalf of both prosecutors and defense attorneys. Dr. Tepper tested and interviewed appellant, and forwarded a report to counsel in early December of 1992, some two months before trial. The report was prepared in anticipation of both this case and appellant's other open cases, since lead trial counsel was his attorney in each matter. In his report, Dr. Tepper informed counsel that he found nothing in his examination and testing of appellant that would be helpful in terms of mitigation evidence. *Id.* at 41-45, 61-68.

The reasonableness of counsel's investigation and preparation for the penalty phase, of course, often depends critically upon the information supplied by the defendant. *E.g. Commonwealth v. Uderra*, 706 A.2d 334, 340-41 (Pa. 1998) (collecting cases). Counsel cannot be found ineffective for failing to introduce information uniquely within the knowledge of the defendant and his family which is not provided to counsel. *Id. See also Bracey*, 795 A.2d at 944 (where appellant and his family failed

to reveal history of abuse to counsel, counsel cannot be deemed ineffective for failing to present such evidence). *Strickland v. Washington*, which was itself a case involving alleged ineffective assistance in the penalty phase of a capital trial, emphasized the flexibility required in reviewing these sorts of claims:

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's

> actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable. In short, inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions . . . .

466 U.S. at 690-91 (citation omitted).

In the case *sub judice*, lead trial counsel testified that he spoke to appellant and to appellant's family on numerous occasions, and none of them

related the history of abuse and/or family dysfunction that counsel are now faulted for failing to present. Because appellant and his family, who were in a position to know about the additional childhood trauma to which appellant allegedly was exposed, failed to reveal that trauma to counsel, and appellant has not shown how counsel should otherwise have learned of it, counsel was not ineffective in this regard. *Strickland*; *Bracey*. Moreover, the course pursued by counsel at the penalty phase was certainly reasonable given the information that appellant and his family had actually divulged to counsel. Counsel employed the information provided to them, which portrayed appellant in a more positive light and suggested that the crime was uncharacteristic of appellant, as mitigation evidence under the catchall mitigation provision of the statute. Counsel cannot be deemed ineffective merely because a reasonable strategy employed proved to be unsuccessful.

Appellant also argues that counsel must be deemed ineffective under *Williams* because they did not investigate mitigation evidence in a timely fashion. Appellant suggests that the *Williams* Court "found" that counsel in that case were "constitutionally deficient" because they did not begin to prepare for capital sentencing until a week before trial. Reply Brief of Appellant, 4. Appellant then argues that counsel here performed in a worse manner since they allegedly failed to prepare for the penalty phase until after the guilt phase

verdict. This argument is meritless as well as specious. First, although it is true that the *Williams* court cited to the timing of counsel's preparation and ultimately sustained the state trial court's holding that counsel were ineffective, the Court never held that the timing alone rendered counsel ineffective. Rather, it was just one of many factors cited in the Court's *Strickland* analysis.

More importantly, the record contradicts appellant's assertion that counsel in this case did not begin to investigate mitigation evidence until after the guilty verdict. Appellant cites to places in counsel's testimony where they refer to the efforts made on the eve of the penalty phase in this case without acknowledging the overall circumstances. In fact, lead counsel had also been appointed to represent appellant in his other criminal cases, including a separate homicide, which proceeded to trial in December 1992, approximately two months before the trial in this case. During the previous trial, lead counsel had spoken with family members with respect to information about appellant that might be helpful in mitigation. N.T. 4/15/97 at 32-35, 62-64, 82-83. In addition, counsel had hired Dr. Tepper prior to the previous trial. One of the reasons for referring appellant to Dr. Tepper for evaluation was to discover any evidence that might be helpful as mitigation evidence in the penalty phase. Dr. Tepper's report was completed and forwarded to counsel in early December, two months before this trial. Thus, the record belies appellant's

misstatement that his counsel did not begin preparing for the penalty phase until the night before the hearing began.

Appellant's argument that counsel were ineffective for failing to discover and produce evidence of appellant's alleged mental and emotional deficiencies is equally meritless. First, as noted above, counsel in fact explored the option of mental health evidence by retaining the services of Dr. Tepper. Nothing in Dr. Tepper's report, and nothing communicated by appellant and his family alerted counsel or Dr. Tepper that credible mental health mitigation evidence might have been available. Moreover, the PCRA hearing below provided nothing that calls into question counsel's stewardship in this regard. At the PCRA hearing, appellant presented the testimony of a neuropsychologist and a psychiatrist who opined that appellant suffered from organic brain damage at the time of the murder. Both experts testified regarding the testing they had administered, the results of those tests, and their conclusion that appellant suffered from organic brain damage.[7] The Commonwealth, however, presented the testimony of a neuropsychologist, Dr. John Gordon, who discredited the testimony of both of appellant's experts. Dr. Gordon

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[7] *See* N.T. 4/14/97 for testimony of Barry M. Crown, Ph.D. (neuropsychologist), and N.T. 4/21/97 for testimony of Richard G. Dudley, Jr., M.D. (psychiatrist).

testified, *inter alia*, that the testing conducted by appellant's neuropsychologist was administered improperly according to standard procedures, that some tests were mis-scored, and that reporting of the test data was incomplete. N.T. 7/16/97 at 22-24. Dr. Gordon concluded that the information relied upon and testified to by appellant's experts did not support a diagnosis of organic brain damage. *Id.* at 20. The PCRA court, which heard the testimony of these experts, found that the Commonwealth's expert "thoroughly refuted" the testimony of appellant's experts. We will not disturb this credibility finding as the record evidence supports it. *Commonwealth v. White*, 734 A.2d 374, 381 (Pa. 1999) ("where a PCRA court's credibility determinations are supported by the record, they are binding on the reviewing court"). Because the belated claim that appellant suffers from organic brain damage lacks merit, and because counsel's actions with respect to potential mental health testimony were reasonable, the claim of counsel ineffectiveness fails.

* * * *

For the foregoing reasons, we affirm the order of the PCRA court. The Motion for Remand is denied.[12]

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[12]The Prothonotary of the Supreme Court is directed

(continued...)

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Nigro concurs in the result.

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[12](...continued)
to transmit the complete record in this case to the Governor in accordance with 42 Pa.C.S. § 9711(i).

(EXCERPT)

[J-137-1999]
IN THE SUPREME COURT
OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 212 CAPITAL APPEAL DOCKET
	:	
Appellee	:	Appeal from the Order entered on 12/10/97 in the Court of Common Pleas, Philadelphia
v.	:	County, Criminal Division, at Nos. 1778-1/4, 1783, 1785, and 1787 January term, 1992
JESSE BOND,	:	
	:	Submitted:
Appellant	:	July 15, 1999

CONCURRING OPINION

MR. JUSTICE SAYLOR

DECIDED: August 23, 2002

I concur in the result . . . .

* * * *

. . . [A]s concerns the claim of ineffectiveness of trial counsel in the investigation and presentation of evidence of mitigating circumstances in the penalty phase of trial, the majority emphasizes the precept that the reasonableness of counsel's investigation and preparation often depends critically on information supplied by the defendant and his family. *See* Majority Opinion, *slip op.* at 17. I believe that it is equally fundamental to expressly recognize that whether critical information is elicited from the defendant and his family often depends upon the sufficiency of counsel's interviews and investigation. *See, e.g., Commonwealth v. Basemore*, 560 Pa. 258, 290, 744 A.2d 717, 735 (2000) ("different light falls upon counsel's performance depending upon whether he asked and was not told, or he did not ask and therefore was not told" (citation omitted)). Here, however, although certainly Appellant is able to identify several weaknesses concerning the manner in which the penalty phase investigation was conducted, I agree with the majority's conclusion that counsel's efforts (particularly in the employment of and reliance on a forensic psychologist in the investigation) were sufficient to meet the applicable Sixth Amendment standard.

(EXCERPT)

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	JANUARY TERM, 1992
	:	NO. 1783, 1/2
v.	:	
	:	SUPERIOR COURT
JESSE BOND	:	NO.

SAVITT, J. JANUARY 26, 1998

OPINION

FACTS AND PROCEDURAL HISTORY

In the early evening of October 31, 1991 Jesse Bond, petitioner, and Aaron Wheeler entered the Stop and Go Deli at 2000 North Broad Street in Philadelphia and announced a robbery. Petitioner pointed a gun at a store employee and told him to open the register at which point the store manager, Jai Ho Lee, closed and locked the register and threw the key on the floor. Petitioner's response was to shoot Mr. Lee in the chest causing his death.

Following a jury trial, petitioner was convicted of first degree murder, robbery, possessing an instrument of a crime and conspiracy.

At the penalty stage hearing the Commonwealth presented evidence of three aggravating circumstances; the crime was committed during the perpetration of a felony (42 Pa.C.S.A. §9711(d)(6)); the defendant has a significant history of felony convictions involving the use or threat of violence to the person (42 Pa.C.S.A. §9711(d)(9)); and, the defendant has been convicted of another murder committed in any jurisdiction and committed either before or at the time of the offense at issue (42 Pa. C.S.A. §9711(d)(11)). In mitigation the petitioner presented evidence concerning the character and record of the petitioner (42 Pa.C.S.A. §9711(e)(8)); that petitioner has no significant history of prior criminal convictions (42 Pa.C.S.A. §9711(e)(1)) and the age of the petitioner at the time of the offense (42 Pa.C.S.A. §9711(e)(4)). After deliberation, the jury found all three aggravating circumstances, no mitigating circumstances and returned a verdict of death. Petitioner's conviction and sentence were affirmed by the Pennsylvania Supreme Court on January 12, 1995.

The instant Post Conviction Relief Petition was filed on June 1, 1995, counsel was appointed and filed an amended petition on September 21, 1995, a supplemental amended petition on October 19, 1995 and a second supplemental amended

petition on May 17, 1996. Michael Wiseman, Esquire entered his appearance as co-counsel on June 19, 1996. The Commonwealth filed its first motion to dismiss on February 22, 1996 and a second motion to dismiss on October 1, 1997.

Evidentiary hearings were held on April 14, 1997, April 15, 1997, April 18, 1997, April 21, 1997 and July 16, 1997. Counsel for the defense and for the Commonwealth were directed to file memoranda of law by October 1, 1997, argument was held on October 27, 1997 and on December 10, 1997 the PCRA petition was dismissed. This appeal followed.

* * * *

With respect to the penalty stage of the trial, petitioner argues that trial counsel was ineffective for not presenting adequate mitigation testimony, ...

* * * *

Petitioner further argues that trial counsel was ineffective for not presenting certain evidence of mitigating circumstances, specifically, for not presenting evidence that he was under the influence of extreme mental or emotional disturbance, Pa.C.S.A. §9711(e)(2); the impairment of his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law,

42 Pa.C.S.A §9711(e)(3) and other evidence of mitigation concerning his background and character 42 Pa.C.S.A. §9711(e)(8). He argues that the testimony of Dr. Barry Crown and Dr. Richard Dudley at the PCRA hearings demonstrates that he is the victim of organic brain damage which substantially impaired his ability to conform his conduct to the requirements of law and that he suffers from post traumatic shock syndrome. This argument has no merit.

Dr. Barry Crown, a neuropsychologist who examined petitioner in January of 1996, testified at the PCRA hearing on April 14, 1996 that petitioner was suffering from organic brain damage which prevented him from conforming his behavior to the requirements of law at the time of the killing in October of 1991. Dr. Crown based his opinion on his interview with petitioner, certain psychological tests he gave petitioner, his review of medical records of a head injury suffered by petitioner in 1988, his review of petitioner's school records and his review of the affidavits of petitioner's family members.

Dr. Richard Dudley testified at the April 21, 1997 hearing, based solely on information provided to him by the petitioner, school records, medical records, affidavits of family members and Dr. Crown's report, that petitioner was suffering from organic brain damage at the time of the offense. He also testified that petitioner was suffering from

post traumatic stress syndrome at the time of the evaluation in 1996, based solely on information provided to him by petitioner himself, school records, medical records, his family's affidavits and Dr. Crown's report.

The testimony of both Dr. Crown and Dr. Dudley was thoroughly refuted by Dr. John Gordon, a neuro-psychologist, who testified for the Commonwealth at the July 16, 1997 PCRA hearing. Dr. Gordon testified not only that some of the tests on which Doctors Crown and Dudley based their diagnosis of organic brain damage had been incorrectly administered, but also that the results had been misinterpreted in that they do not demonstrate that Mr. Bond's intelligence is in the retarded range or that Mr. Bond is the victim of organic brain damage. Rather, Dr. Gordan testified the test results demonstrate that Mr. Bond does not suffer from organic brain damage since no person with such brain damage could have achieved the scores that Mr. Bond achieved on the tests. Dr. Gordon also testified that Mr. Bond's school records did not demonstrate organic brain damage. Further, no evidence of an MRI or a CAT scan which might show organic brain damage was presented by either defense witness. Petitioner has failed to meet his burden of showing that he suffered from organic brain damage at the time of the offense and there is, therefore, no showing that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law

was impaired, pursuant to 42 Pa.C.S.A. §9711(e)(3). Accordingly, petitioner's claim has no arguable merit, counsel cannot be held to be ineffective for not presenting a meritless defense and petitioner is not entitled to a new penalty stage hearing in this matter.

With respect to Dr. Richard Dudley's testimony that petitioner suffered from post-traumatic stress syndrome when he examined him in 1996, there is no showing that petitioner suffered from this disorder at the time of the offense in 1991. Accordingly, petitioner has failed to carry the burden of showing that, at the time of the offense, he was under the influence of extreme emotional or mental disturbance at the time of the offense pursuant to 42 Pa.C.S.A. §9711(e)(2). Accordingly, this claim has no arguable merit, counsel cannot be held to [be] ineffective for not presenting a meritless claim and petitioner is not entitled to a new penalty stage hearing on this basis.

Finally, petitioner argues that trial counsel was ineffective for not presenting evidence of abuse and deprivation in his childhood in support of the "catchall" category of other mitigating evidence concerning a defendant's character or background. 42 Pa.C.S.A. §9711(e)(8). This argument has no merit. At the penalty stage hearing counsel did indeed present evidence that petitioner was one of five children, that his father left when he was six years old, that he had dropped out of high school

because he was attacked by gangs, that he tried to enlist in the armed forces but was not successful, that he could not obtain employment, that his mother became ill and that his brother died shortly before this offense. Thus, ample evidence of mitigation pursuant to 42 Pa.C.S.A. §9711(e)(8) was presented at the penalty stage of trial and there is no record showing that there is a reasonable possibility that the testimony of his mother and siblings offered at the PCRA hearing would have changed the outcome of the penalty stage had it been presented at that time. Accordingly, there is no showing that petitioner was prejudiced and he is not entitled to a new penalty stage hearing on this basis.

For the reasons set forth herein the Post Conviction Relief Act Petition was dismissed.

/s/ Savitt
J.